INDEX.

SUBJECT INDEX.

	Page
Preliminary Statement	1
Statutory basis for appeals	1
Reasons why case not yet docketed	2
Notice of allowance of appeals and of intention to submit motion this 7th day of February, 1934, given opposing counsel	2
Summary Statement of the Case	3
Finely adjusted and balanced schedules on inter- and intrastate coal rates to northeastern Ohio destinations long in effect prior to August 1, 1932	3
On August 1, 1932, Public Utilities Commission of Ohio upset balance by ordering reduced rates on intrastate movements of bituminous coal	3
Interstate carriers of bituminous coal to northeastern Ohio destinations petition Interstate Commerce Commission for relief	4
Commission's Report	4, 19
Commission's Order of May 2, 1933	7, 69
State of Ohio and others file bills of complaint to enjoin and set aside Commission's order	8
Effective date of said order extended and later stayed by District Court	9, 71
District Court's Opinion, January 6, 1934	9, 75
Instant appeals directed solely at so much of decretal order of lower court as further suspends Commission's said order	13, 148
Appellants ask abatement thereof for its unexpired term	13, 14
Because of irreparable damage	14
Because arbitrary	14
Because contrary to the law as interpreted in the *Virginian* case	15
Pertinent citation of Virginian case opinion governing this case	15
Daily losses suffered by appellants because of continuance of stay	16, 17, 135
Certified Copies of Orders, Opinion, Decree, etc. of U. S. Dist. Ct., Southern Dist. Ohio, Eastern Division, Submitted with Appellants' Motion to Abate in Part Decree and Order Below	71-147
Temporary Restraining Order of July 7, 1933, 1039 and 1040	71, 73
Opinion of District Court	75
Final Decree	84, 86
Findings of Fact and Conclusions	88

Page

Applications for stay pending appeal 98, 107
Affidavits in Support:
Wm. Emery, Jr. 101
R. L. Ireland, Jr. 104
P. C. Sprague 109
Opposition of I. C. C. to application 113
Affidavits in Support:
Roy S. Kern 130
Roy S. Kern 135
J. Noble Snider 137
Elmer Striebel 141
Further stay for sixty days 145
Application of United States, Interstate Commerce Commission and others for allowance of appeal to Supreme Court, U. S. 148
Appeal allowed February 3d, 1934 152
Assignment of Errors 153
Bonds on appeal approved 154
Jurisdictional statement 155

CASES CITED.

Intrastate Rates on Bituminous Coal within the State of Ohio (192 I. C. C. 413) 4, 6, 19
Ohio-Michigan Coal Cases, 80 I. C. C. 663 3
Virginian Railway Company v. United States, 272 U. S. 658, 672 ..... 72, 73

STATUTES.

Act of Oct. 22, 1913, c. 32, 38 Stat. 220, U. S. Code Tit. 28, Secs. 47 and 47a 1
Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 220 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE MONONGAHELA RAILWAY COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH, CHARTIERS & YOUGHIOGHENY RAILROAD COMPANY, THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, THE PITTSBUGH & LAKE ERIE RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, THE VIRGINIAN RAILWAY COMPANY, WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU, CARNEGIE COAL COMPANY, AND OTHERS, APPELLANTS,

vs.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO, AND OTHERS, APPELLEES.

And No.

SAME APPELLANTS,

vs.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, AND OTHERS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION TO ABATE SO MUCH OF THE ORDER OF THE DISTRICT COURT ENTERED IN ABOVE CAUSES ON THE 19TH DAY OF JANUARY, 1934, AS STAYED THE OPERATION AND ENFORCEMENT OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION OF MAY 2D, 1933, FOR SIXTY DAYS FROM THE FIRST MENTIONED DATE "FOR THE PURPOSE OF PERFECTING AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES."

Preliminary Statement.

The cases are here on direct appeals prayed under provisions of the Act of October 22, 1913, c. 32, 38 Stat. 220;

U. S. Code Title 28, Sections 47 and 47a, and allowed February 3d, 1934, by Mr. Justice McReynolds.

The cases have not yet been docketed because of certain requirements of the rules of practice of this Court (Rule 12, paragraphs 2 and 3) as to the make-up and return of the transcript of the record by the clerk of the District Court, but copies (see Post p. 148 et seq.) of

(a) Application for allowance of appeals,
(b) Order allowing the same,
(c) Assignment of errors, and
(d) Jurisdictional Statement required under paragraph 1 of Rule 12 of the Rules of Practice of this Court,

were forwarded by United States Mail of ~~January~~ February 3d, 1934, to each of the following persons:

Honorable John W. Bricker, Attorney General, State of Ohio, Columbus, Ohio;
Clan Crawford, Esq., Union Trust Building, Cleveland, Ohio;
Andrew P. Martin, Esq., Union Trust Building, Cleveland, Ohio;
Ernest S. Ballard, Esq., 120 South La Salle St., Chicago, Illinois.

Likewise, on said February 3d, 1934, the following telegram was sent by means of Western Union service to each of the above-named attorneys:

"Appeal by all defendants below to Supreme Court United States to review so much of order of January nineteenth district court, Columbus, Ohio, dockets 1039 and 1040 as suspends effective date commission's order for sixty days has been allowed this date. We will on Wednesday next at noon on strength of record papers presented with petition for allowance submit motion to

Supreme Court to suspend such stay order at which time and place you may appear if so advised."

It is believed, and submitted with deference, that the unusual action of the learned district court for the Southern District of Ohio, Eastern Division, in suspending the order of May 2d, 1933, of the Interstate Commerce Commission and the serious exigencies created thereby, afford substantial basis and fully justify the absence on part of above appellants of full compliance with the formal requirements of the Rules of Practice of this Honorable Court.

Summary Statement of Case.

For many years prior to August 1, 1932, there had been in effect a finely balanced and adjusted schedule of interstate and intrastate rates on Bituminous Coal from Western Pennsylvania, Northern West Virginia and certain Ohio, e. g., Ohio No. 8 coal mining districts, to northern Ohio destinations, with fixed differentials which were regarded as essentially reasonable, in view of the numerous elements which have to be considered in rate making. The rate structure referred to was very fully and carefully considered in Ohio-Michigan Coal Cases, 80 I. C. C. 663, decided June 8, 1923, and the adjustments including fixed differentials, and the schedules thereupon made effective continued in force and governed the highly competitive conditions prevailing in the mine fields to destinations indicated until August 1, 1932, when the Ohio Public Utilities Commission, by a series of mandatory and permissive orders, entered on its records, reduced certain of the intrastate rates effective within the State of Ohio, from local mines to northern Ohio destinations, thereby throwing the combined interstate and intrastate rate structure above referred to and previously existing, out of balance, creating a competitive advantage in favor of the Ohio, and against

the Pennsylvania and West Virginia mine operators, and discriminating against shippers in interstate commerce who were in active competition for business at the several destinations.

Following such reduction orders, which lowered the then existing rates from 4 to 29 cents per ton, the principal carriers by steam railroad, operating within Ohio, all, with minor exceptions engaged both in interstate and intrastate commerce, petitioned the Interstate Commerce Commission for relief from the Ohio reduced rates, alleging that they constituted and effected violation of Section 13 of the Interstate Commerce Act.

Hearings were had, voluminous testimony was taken and much argument was heard. On submission the Commission summarized the rate and competitive situation in pertinent part as follows (Post p. 55):

> "The rate adjustment in the territory under consideration is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this Commission. Mining properties outside the State of Ohio have been located and developed with heavy investments in facilities under the rate relationships existing prior to the reductions in the State of Ohio, and these properties are now being financially and physically seriously affected. One of the complainants has become bankrupt since the filing of its complaint, and others are on the verge of disaster. The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads. Not only is the truck being used to affect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Appar-

ently this form of competition is increasing as good roads are being built. Petitioners in the present proceeding do not contend that the competition of trucks is so great as to justify the reduced rail rates in Ohio. The record fully establishes that the coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant. We are asked to prescribe reasonable rates from the Pittsburgh and certain other groups to northeastern Ohio as well as to remove undue prejudice against interstate coal producers and unjust discrimination against interstate commerce. Under the circumstances here presented such rates should be determined with great regard for the value of the service to the shipper and the existing competitive conditions. Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this Commission was organized.

"Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago.

* * * * * * *

"Petitioning respondents submit that if the Ohio reductions remain in effect it will be necessary to resort to reductions from interstate districts to maintain the long established relationships. The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce, and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio."

and found that (Post p. 57):

"The record definitely establishes that coal from Pennsylvania, West Virginia, and Ohio mines is highly competitive at Cleveland and other destinations in northeastern Ohio to which the assailed rates apply and that there is a substantial movement of the coal from those points to such destinations. It further appears that the movement of such coal from Ohio points or groups and to the Ohio territory outlined in Appendix D is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other; that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled.

"We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, except that the measure of the rates from points on the Monongahela Railway in northern West Virginia, and their relation to the rates from the Pittsburgh and Connellsville districts will be reserved for further consideration.

"We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio.

"We further find that from the points or groups and to the territory outlined in Appendix D to this report the assailed Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act.

"Such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in Appendix D" (Post, p. 58).

May 2d, 1933, pursuant to its report and findings summarized as above, the Commission entered its order requiring "all common carriers by railroad operating in the State of Ohio" "according as they participate in the transportation":

"to cease and desist upon (from) practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia to destinations in Ohio, on the one hand, and the intrastate rates on like traffic between points in Ohio as indicated in the said report, on the other, and to establish, on or before June 10, 1933, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the intrastate transportation of bituminous coal, in carloads, from and to the said points in Ohio rates which shall not be less than the rates or bases of rates prescribed as minima in the said report and set forth in Appendix D thereto; provided, that to the specific rates, or the rates resulting from the bases of rates, found in the said

report to be minima for intrastate application as aforesaid; should be added the emergency rates or charges authorized in the *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 179 I. C. C. 213; 191 I. C. C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations.

And it is further ordered, That this order shall continue in force until the further order of the commission." (Post pp. 69-70.)

May 22d, 1933, the State of Ohio and Public Utilities Commission of Ohio, and The Wheeling and Lake Erie Railway Company, invoking provisions of Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, filed their separate bills of complaint in the United States District Court for the Southern District of Ohio, Eastern Division, to set aside and annul said Order of May 2d, 1933, of the Interstate Commerce Commission and prayed issuance of interlocutory injunctions to restrain the United States and the Commission from attempting to enforce said order pending final decree.

In such bills, as provided by law, the United States of America and Interstate Commerce Commission were named as parties defendants. Numerous interested carriers and shippers were subsequently, on motions of intervention, likewise made parties defendant and the Eastern Ohio Coal Operators' Association, and others, were permitted to intervene as parties plaintiff.

The cases came on for hearing upon said bills of complaint, including the report, findings of and testimony and exhibits before the Interstate Commerce Commission, and the answers of defendants thereto, and were heard by three judges, and with consent of all parties, on June 3d, 1933, were submitted as on final hearing for final decree.

At the instance of the District Court itself the effective date of the Commission's said order of May 2d, 1933, was postponed until July 10th, 1933, but prior to said date, to-wit, on July 7th, 1933, the District Court entered its own order restraining and suspending said order of May 2d, 1933, of the Interstate Commerce Commission until the further order of the Court (Post p. 71).

Owing to the suspension of the effective date of the Commission's Order of May 2d, 1933, from June 10th to July 10th, 1933, which was brought about by the above request of the District Court, coupled with the subsequent entry of the Court's own order of July 7th, the relief promised to the interested interstate carriers and shippers by said order of May 2d, 1933, was withheld until January 19th, 1934, while the preferences and discriminations so strikingly summarized and found by the Interstate Commerce Commission were left to grow and fatten the Ohio operators and The Wheeling and Lake Erie Railway Company at the expense of carriers and others engaged in interstate operations.

January 6th, 1934, the District Court handed down its opinion (Post p. 75), which in particular part reads as follows (Post p. 78):

> "* * * In a case of this sort, we are, of course, concerned only with the sufficiency of the evidence to support the fact finding of the Commission and the sufficiency of the facts found to support the conclusion of the order entered. While the Commission must act upon evidence and not arbitrarily, and must properly apply the law, the courts are not concerned with 'the soundness of the reasoning by which its conclusions are reached, or whether the findings are consistent with those made by it in other cases.' Nor are we concerned with the 'wisdom' of the regulation which is prescribed. These are matters left by Congress exclusively to the administrative branch of the Government. * * *

"Viewed in this light, there is no question, we think, that the order of the Interstate Commerce Commission must stand. It may possibly be that the evidence before, and the subordinate fact-findings of, the Commission are insufficient to sustain the ultimate conclusion of discrimination against interstate commerce as a whole. *Florida* v. *United States*, 282 U. S. 194. * * * on the whole we prefer to place our decision on the single ground of the existence, or non-existence, under the intra-state rates, of preference and prejudice as between persons and localities. We do not believe that it is necessary to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131; *Florida* v. *United States*, *supra*, p. 210.

"Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding.

* * * * * * * * *

(P. 82.)

"Lastly it is urged, but with less vigor, that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced. Compare *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 636. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, were referred to in the case of *United States* v. *Louisiana*, *supra*, decided November 6, 1933, as among the purposes of Congress in passing the Transportation Act of 1920. This, we think, is as it should be. Very broad powers have been given the Commission, under section 15*a* of the Inter-

state Commerce Act, to fix rates so that the carriers 'as a whole' may earn 'an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property.' It has been said to be impossible 'to escape the dovetail relation' between sections 13(4) and 15*a* (*Wisconsin R. R. Commission* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563, 586, *Florida* v. *United States, supra*, at 211) and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. * * *

"For the reasons above stated the bills in the present case will be dismissed. An order may first be drawn granting the petitions to intervene upon which the court has not yet acted, and then another order dismissing the bills. Decree may be prepared and filed Saturday, January 13th, 1934."

January 19th, 1934, the temporary injunctions or restraining orders of July 7th, 1933, were vacated and set aside and the bills of complaint (sometimes called "Petitions") of complainants were decreed to be dismissed for want of equity at the cost of the several petitioners. (Post, p. 84.)

It will be noted that the order of the Commission of May 2d, 1933, directing restoration of the previous rate levels governing the transportation in question was held in suspension, first, as result of the comity request by the District Court, to July 10th, 1933, and then, by the entry on July 7th, 1933, of the temporary injunction, until January 19th, 1934, during all of which seven months the undue preference of persons and localities within Ohio and undue prejudice and discrimination against interstate localities and shippers and discrimination against interstate commerce was suffered to continue and to increase at the ex-

pense of those whom the order of the Interstate Commerce Commission as entered was intended to protect.

Prior to presentation of the said decree of January 19th, 1934, for signature, the plaintiffs below, namely, the State of Ohio and the Public Utilities Commission of Ohio, and The Wheeling and Lake Erie Railway Company, and others joined with them as parties plaintiff in the causes, had presented to the District Court applications (Post, p. 98), with supporting affidavits asking a further stay of the Commission's said order of May 2d, 1933, pending determination of their intended appeal to this Honorable Court. An answer opposing such application, likewise supported by several affidavits, was filed by the Interstate Commerce Commission (Post, p. 113), and adopted by the intervening parties defendant below. Notwithstanding the opposition so presented, the learned District Court, while denying the motion for stay as presented, nevertheless, ordered:

> "that the operation and enforcement of the order of the Interstate Commerce Commission dated May 2d, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States, * * *"

and directed the defendant carriers and each of them, from and after "the expiration of sixty days from the date hereof" to "keep accurate account in detail, of all amounts received by them by reason of the increase in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2d, 1933, specifying whom, or in whose behalf, such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or

annulled, the aforesaid carriers, and each of them, shall refund such increases to the persons by whom, or in whose behalf, such amounts were paid. * * *"

The appeal now before this Court is directed solely to so much of above orders as decreed "that operation and enforcement of the order of the Interstate Commerce Commission dated May 2d, 1933, * * * be stayed for a period not to exceed 60 days from the date hereof for the purpose of perfecting an appeal to the Supreme Court of the United States."

These appellants have no objection whatever to so much of said order as directs the keeping of accurate accounts in detail of all amounts received by them by reason of increases in the rates as authorized and required by said order of the Interstate Commerce Commission. So far from objecting thereto, said carriers protesting the further suspension of the effective date of the Commission's said order, offered to submit without demur to a similar accounting order to cover the entire period from the date of the entry of the decree below until the final disposition of this case on appeal to this Court.

In the circumstances disclosed and upon the facts stated which in every essential detail are believed to find complete and absolute support in the certified copies of the principal portions of the record of proceedings had in the court below, it is respectfully submitted that so much of said final order attending the final decree of the United States District Court for the Southern District of Ohio, entered January 19th, 1934, as decrees "the operation and enforcement of the order of the Interstate Commerce Commission dated May 2d, 1933 * * * be stayed for a period not to exceed sixty days from the date (t)hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States" be abated to the full extent

that such sixty day period remains unexpired, and that in lieu thereof, these appellant carriers as they participate in the transportation involved be required to keep accurate accounts in detail of all amounts received by each of them by reason of increases in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2, 1933, pending the final determination of these appeals by this Honorable Court and the entry of such further order or orders in the premises as it may direct.

As ground for such motion appellants respectfully show:

1. Upon the findings of facts made by the Interstate Commerce Commission and affirmed by the specially constituted District Court, these carriers already have suffered irreparable damages in earnings denied and business diverted by reason of the reductions in the Ohio intrastate rates and the suspensions of the effective date of the Order of May 2d, 1933, from June 10th, 1933, to January 19, 1934 (see affidavits, Post pp. 130, 135), and since.

2. Because having found said Order of May 2d, 1933, of the Interstate Commerce Commission to be valid in law and in all respects to have been justified by the evidence, and having decreed dismissal for want of equity of the several bills of complaint brought to enjoin its operation, it was at best but the exercise of arbitrary power in the stead of true judicial discretion to further and longer deny these appellants and the shippers and localities served by them the benefit of the rates and the competitive advantages which said valid and well conceived order of the Interstate Commerce Commission was intended to afford to them.

3. The suspending, in the circumstances of said Order of May 2d, 1933, pending the perfecting of an intended

appeal to this Honorable Court is directly opposed to the rules for the governance of procedure in matters of such sort laid down by this Court in *Virginia Railway Company v. The United States*, 272 U. S. 658, 672, *et seq.* where it is said:

> "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Company*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.
>
> "In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that

> the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

In the instant case there is neither showing nor any indication of doubt on part of the three judges or any one of them who composed the District Court; nor is it even suggested in any particular whatever that the decision of the case by this Court will depend upon any question of law upon or about which there is conflict among the courts of the several circuits; nor was any other special reason why the order of the Commission ought not to become operative the expirations of sixty days or until the intended appeal to this Court could be perfected. The District Court made no finding or statement whatever indicating its reasons for suspending the operation of the Commission's order.

The only showing made by applicants for the stay was upon representations partaking essentially of the merits of the controversy already determined against them by the Interstate Commerce Commission and the District Court. On the contrary, counter-affidavits filed by the intervening defendants demonstrate that the undue prejudice to persons and localities and the unjust discrimination against interstate commerce upon which the Commission granted its order have continued since on or about August 1st, 1932, when the Ohio intrastate rates were reduced, and will continue until removed by the increase in the rates on Ohio intrastate commerce as ordered by the Interstate Commerce Commission.

The affidavit presented by the carrier appellants here established a revenue loss of approximately $2,000 per day until the order of the Commission becomes operative.

Such loss represents irreparable injury for there is no means by which restitution can be obtained by said carriers if the decree of the lower court dismissing the bill is sustained. Nor is there any means by which interstate shippers can obtain restitution for damage resulting from lost markets during the interim. Had the District Court permitted the order of the Interstate Commerce Commission of May 2d, 1933, to become effective upon the entry of the decree, as it should have done in view of the opinion rendered, no irreparable injury would have ensued to any party, for in the event the decree be reversed the shippers have the right of restitution against the carriers and may recover the amounts paid in excess of any rates established as a result of final decision.

Respectfully submitted,

J. Crawford Biggs,
Elmer B. Collins,
For United States of America.

J. Stanley Payne,
For Interstate Commerce Commission.

John Fox Weiss,
For Public Service Commission, Commonwealth of Pennsylvania.

Charles R. Webber,
M. Carter Hall,
Leo P. Day,
Guernsey Orcutt,
Frederic D. McKenney,
For Appellant Carriers.

August G. Gutheim,
Henry C. Hall,
Alex M. Bull,
For Other Appellants.

18803

INTERSTATE COMMERCE COMMISSION

No. 25566 [1]

INTRASTATE RATES ON BITUMINOUS COAL WITHIN STATE OF OHIO

Submitted April 18, 1933. Decided May 2, 1933

1. Rates on bituminous coal, in carloads, between points in Ohio, found to result in undue prejudice against persons and localities and unjust discrimination against interstate commerce. Rates, or bases of rates, prescribed to remove the undue prejudice and unjust discrimination.
2. Rates on bituminous coal, in carloads, from the Pittsburgh (except from mines on the line of the Pittsburgh & West Virginia Railway Company), Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio, found reasonable, except as indicated herein.
3. Proposed increased rates on bituminous coal, in carloads, from the Pittsburgh district on the line of the Pittsburgh & West Virginia Railway Company, to destinations in northeastern Ohio, found justified. Order of suspension vacated and proceeding discontinued.
4. Measure of rates from points on the Monongahela Railway in northern West Virginia, and their relationship to the rates from the Pittsburgh and Connellsville districts, reserved for further consideration.
5. Complaints, except nos. 25656 and 25670, dismissed.

Guernsey Orcutt, *M. Carter Hall*, *D. Lynch Younger*, *Charles R. Webber*, *Leo P. Day*, *John J. Fitzpatrick*, *W. S. Bronson*, *R. W. Paisley*, *Andrew P. Martin*, and *T. H. Fee* for various respondents and defendants.

August G. Gutheim, *A. S. Boden*, and *W. P. Buffington* for protestants in Investigation and Suspension Dockets Nos. 3801 and 3833, complainants in no. 25590, and interveners in nos. 25656, 25657, and 25670; *John B. Keeler* and *A. A. Mattson* for complainants in no. 25656 and interveners in nos. 25590, 25657, and 25670; *E. J. McVann* for complainants in no. 25657 and interveners in nos. 25590, 25656, and 25670; and *Henry C. Hall*, *Alex. M. Bull*, and

[1] This proceeding also embraces Investigation and Suspension Docket No. 3801, Coal from Pennsylvania to Northern Ohio; Investigation and Suspension Docket No. 3833, Coal from Pennsylvania to Northern Ohio (2); No. 25590, *Western Pennsylvania Coal Traffic Bureau et al. v. Akron, Canton & Youngstown Railway Company et al.*; No. 25656, H. W. Showalter, Receiver, *Continental Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.*; No. 25657, *Property Owners' Committee et al. v. Akron, Canton & Youngstown Railway Company et al.*; and No. 25670, Robert G. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of the *Consolidation Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.*

192 I.C.C.

J. F. Graves for complainants in no. 25670, and interveners in nos. 25590, 25656, and 25657.

Ernest S. Ballard, D. F. Hurd, T. H. Burgess, R. A. Eldridge, H. D. Rhodehouse, Beecher W. Waltermire, D. H. Armstrong, H. A. Hauxhurst, Andrew H. Brown, Clare B. Tefft, W. M. Lorenz, J. P. Hannan, J. C. Argetsinger, A. C. Graham, W. H. Welsh, James W. Huffman, W. R. Hubbard, H. D. Fenske, A. B. McElvany, Curtis Reed, C. W. Krone, P. E. Fickenscher, John Fox Weiss, Charles Reitell, E. J. Hopple, J. W. Herrold, Walter A. Jones, John G. Hoffstot, H. C. Young, John L. Rogerson, Jr., W. K. Bromley, H. J. Carroll, W. J. McCauley, H. J. Zimmerman, William B. Faulkner, C. F. McBride, G. H. Staat, G. A. Swineford, J. G. Young, Henry L. Goemann, Fred M. Renshaw, and *F. M. Garland* for various parties.

REPORT OF THE COMMISSION

McMANAMY, *Commissioner:*

Upon petition of the principal railroads operating within the State of Ohio, alleging a violation of section 13 of the Interstate Commerce Act, we entered upon an investigation concerning the lawfulness of all rates and charges for the intrastate transportation of bituminous coal, in carloads, from eastern Ohio mines to destinations in northeastern Ohio from and to which the Public Utilities Commission of Ohio fixed or authorized rates by orders in its dockets shown in the margin,[2] and all rates and charges on like traffic permitted by the Ohio commission to be established from and to the points also named in the margin, and also from the said Ohio mines to points intermediate to the destinations in Ohio to which the rates were required to be reduced under the long-and-short-haul provision of the law administered by the Ohio commission, with a view to prescribing such nondiscriminatory, nonprejudicial, and otherwise lawful rates and charges for such traffic as the facts and circumstances may warrant. Petitioners ask for a finding that the rates required, authorized, or permitted to be established by the Ohio commission are unlawful, and cause an undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and an undue, unreasonable, and unjust discrimination against interstate commerce. An order requiring removal of the advantage, preference, prejudice, and discrimination is sought.

[2] Nos. 7252, 7036, 8072, and 8097, and special permission no. 6492. From Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts, to northeastern Ohio, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points.

The issues raised in the investigation and suspension, and complaint cases embraced in this proceeding will be discussed following consideration of those under the thirteenth-section petitions. Rates will be stated herein in amounts per net ton of 2,000 pounds, unless otherwise indicated, and do not include the surcharge of 6 cents per ton which was applicable on both State and interstate traffic in addition to the rates shown herein at the time of the hearings in this proceeding, but was made inapplicable in the State of Ohio effective April 1, 1933. The relationship between the rates on bituminous coal to northeastern Ohio on intrastate and interstate shipments is an issue in this proceeding and our decision with respect thereto will dispose of the issue concerning the application of the surcharge to that territory. The propriety of reestablishing the 6-cent surcharge on bituminous coal between all points in Ohio is the subject of a general investigation instituted in No. 25885, *Surcharge on Bituminous Coal Within the State of Ohio*, now pending.

The thirteenth-section proceedings under consideration were instituted in consequence of reductions in rates on bituminous coal from points or mining groups in eastern Ohio to that portion of Ohio lying east of the Sandusky-Galion line and north of an east-and-west line drawn through Columbus, including Canton, Massillon, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points, which reductions were established, authorized, or permitted by the Ohio commission. The first reductions took effect August 1, 1932, as required in Ohio Commission Docket No. 7252, *Republic Steel Corp.* v. *Baltimore & Ohio R.R. Co.*, as follows.

	Prior	Estab. Aug. 1, 1932
From Brewster and Massillon City No. 8 mines in the Massillon district (W. & L. E.):	*Cents*	*Cents*
To Massillon, Ohio	64	60
To Canton, Ohio	101	72
From North Industry and Black Oak No. 2 mines in the Middle district (B. & O.):		
To Massillon, Ohio	101	80
To Canton, Ohio	76	60
From all other points in Massillon and Middle districts:		
To Massillon, Ohio	101	80
To Canton, Ohio	101	80
From Ohio No. 8 district:		
To Massillon, Ohio	126	108
To Canton, Ohio	126	108

Prior to the effective date of the rates in the foregoing table the Wheeling & Lake Erie Railway Company, hereinafter termed the Wheeling, sought permission if the Ohio commission to establish

reduced rates from its mines in Ohio No. 8, Middle-Coshocton, and Massillon districts to Cleveland, Huron, Lorain, Akron, and intermediate points on the lines of the Wheeling, the Lorain & West Virginia Railway Company, and the Akron, Canton & Youngstown Railway Company. This permission, no. 6492, was granted and the following illustrates these reductions which were also made on August 1, 1932:

To—	From Ohio No. 8 district		From Middle district		From Massillon district	
	Prior	Estab. Aug. 1, 1932	Prior	Estab. Aug. 1, 1932	Prior	Estab. Aug. 1, 1932
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Cleveland, Ohio	174	145	154	122	154	108
Huron, Ohio	174	155	164	134	159	115
Lorain and South Lorain, Ohio	174	145	154	128	154	108
Akron, Ohio	151	128	126	101	126	87

Immediately following these reductions the Pittsburgh & West Virginia Railway Company sought and obtained permission to reduce its rates a similar amount from its Ohio No. 8 district to the destinations shown, and these reductions took effect August 12, 1932. Thereafter the Baltimore & Ohio Railroad Company, the New York Central Railroad Company, and the Pennsylvania Railroad Company sought and obtained permission of the Ohio commission also to reduce their rates from Ohio No. 8, Middle-Coshocton, and Massillon districts to Cleveland, Lorain, Huron, Akron, Rocky River, and Orrville. These reductions were substantially the same as made by the other carriers, and became effective September 2, 1932.

As a result of a general investigation instituted in Ohio Commission Docket No. 8072 the Baltimore & Ohio, the Pennsylvania, the New York Central, the Wheeling, and the Pittsburgh & West Virginia, were required to reduce their rates from the Cambridge, Crooksville, and Hocking districts on September 29, 1932, by substantially the same amount as the reductions from the Ohio No. 8 district to the same destinations.

On October 28, 1932, the New York Central was required in Ohio Commission Docket No. 8097 to reduce its rates from the Pomeroy district to northeastern Ohio by substantially the same amount as the reductions from the Ohio No. 8 district. The findings of the Ohio Commission in its nos. 8072 and 8097 required the reduced rates from the Hocking, Crooksville, and Pomeroy districts to be established only via available routes through non-

affected territory to hold inviolate the findings in *Ohio-Michigan Coal Cases*, 80 I.C.C. 663.

On August 20, 1932, the Baltimore & Ohio was required to reduce its rate from the Cambridge district to Mansfield from $1.76 to $1.51 in Ohio Commission Docket No. 7036. All of the reduced rates resulting from the several orders of the Ohio commission are published to expire on August 1, 1933, except those resulting from the orders in nos. 7252 and 7036.

The prior and reduced rates between typical points in Ohio and the present interstate rates from and to the points or groups under consideration, together with the average distances over the short tariff routes as set forth in exhibits are reproduced in appendix A hereto.

As will be observed from the foregoing the reduction from Ohio No. 8 to Cleveland and Lorain was 29 cents. Similar reductions were made to Orrville and Rocky River. The rate from the Pittsburgh district to these destinations has for many years been 10 cents over Ohio No. 8, or $1.84. No change was made in the rate from the Pittsburgh district, except by the Pittsburgh & West Virginia. That carrier's witness testified that as his company was required to reduce its rates from Ohio No. 8 to northeastern Ohio, he felt it necessary to make the same reduction from mines on that line in the Pittsburgh district to the same destinations to avoid undue prejudice. Accordingly in I. and S. No. 3801 that carrier proposed to reduce its rates from the Pittsburgh group to northeastern Ohio, effective September 9, 1932. Typical reductions from the Pittsburgh district on the Pittsburgh & West Virginia were made to Cleveland, Lorain, and Huron. The former rate of $1.84 was reduced to $1.55 to the first two named destinations and to $1.65 to the last destination. After these rates were suspended we vacated our order on October 3, 1932, insofar as reductions were concerned but continued the investigation, and the reduced rates took effect. In consequence of the cancelation of certain forms of concurrences the Pittsburgh & West Virginia was compelled to undertake the restoration of the prior rates from the Pittsburgh district to northeastern Ohio. Upon publication of the increased rates they were suspended in I. and S. No. 3833, until July 27, 1933, and represent an issue in this proceeding.

In consequence of the reductions in the rates under consideration from eastern Ohio mining districts to northeastern Ohio, interstate shippers of bituminous coal, principally operators, located in the Pittsburgh, Freeport, Connellsville, Fairmont, Pocahontas, Tug River, New River, Winding Gulf, Kenova-Thacker, Kanawha, and

Logan groups and generally including the Inner Crescent and Outer Crescent mines in Pennsylvania, northern West Virginia, Virginia, and eastern Kentucky filed complaints consolidated for hearing and disposition with the present proceeding. These complaints allege that the rates from these mining groups to northeastern Ohio are unreasonable, in most instances, and in every instance include an allegation under sections 3 and 13 of the act charging favoritism of the eastern Ohio mining districts on bituminous coal to northeastern Ohio, and discrimination against interstate commerce. The details of these complaints will presently be discussed.

The Pittsburgh district rate to Youngstown, Ohio, was considered in *Youngstown Sheet & Tube Co.* v. *P. & L. E. R.R. Co.*, 29 I.C.C. 428, where the then existing rate of 70 cents was found not unreasonable. Before and since that finding the Ohio No. 8 rate to Youngstown has been the same as the rate from the Pittsburgh district to that destination. The Pittsburgh-Youngstown rate has sometimes been termed the "key rate" in the adjustment to northeastern Ohio, on which the Pittsburgh district rates to this territory have been built. *Bituminous Coal to C.F.A. Territory*, 46 I.C.C. 66, 73. The Pittsburgh district rate to Cleveland at the time the last-named case was decided was $1, which formed the basis for the then existing rate of $1 from the southern Ohio districts to Toledo, Ohio. Later, we established a rate of $1.89 from southern Ohio to Toledo and, to maintain the existing parity, the same rate was made to apply to Cleveland. Upon these rates the entire relative adjustment in this territory has developed. Rates from the Pitstburgh district to northeastern Ohio have for years been made a fixed differential over Ohio No. 8, Connellsville a fixed differential over Pittsburgh, and Fairmont a fixed differential over Connellsville. And from the southern West Virginia and Kentucky fields rates have been constructed differentially over eastern or southern Ohio.

The reductions in the State of Ohio were made applicable by restricted routes in order to avoid a change in rates to intermediate points which are located in so-called affected territory to which rates were fixed in *Ohio-Michigan Coal Cases*, *supra*. As previously stated, prior to the reductions in the Ohio rates the rate from Ohio No. 8 and Cambridge groups had for many years been 10 cents less than from the Pittsburgh group to Cleveland and many other destinations in northeastern Ohio. The reductions in Ohio increased this differential to 39 cents. Since April 1, 1933, when the surcharge of 6 cents was removed from Ohio intrastate traffic, the differential has become 45 cents.

The destination territory embraces a highly industrialized area in which intense competition exists between industries producing

similar products, particularly those producing iron and steel and by-product coke. The important steel-producing points are Cleveland Lorain, Canton, Massillon, Mansfield, and Youngstown, and all of these except Mansfield manufacture by-product coke. These industries compete also with like industries in other States. Northeastern Ohio is served principally by the Pennsylvania, the New York Central, the Baltimore & Ohio, the Wheeling, and the Nickel Plate-Erie system. All of these carriers participate both in the rates and the transportation of bituminous coal from Ohio mines as well as from the Inner Crescent and Outer Crescent mines to northeastern Ohio. Indicative of the extent of the State and interstate movement from these mines, the total tonnage of bituminous coal for the years 1922 to 1932, inclusive, from these various origins to the principal destinations in northeastern Ohio is shown in appendix B. In addition to the total tonnages shown to the principal destinations, there is a very substantial movement from the Inner and Outer Crescents to Youngstown and the Mahoning Valley group. Much of this coal, however, is special purpose coal and is not strictly or wholly competitive with the Ohio coal. For example, in 1929 about 8,000,000 tons moved from the Crescents to Youngstown and the Mahoning Valley group and 134,364 tons from Ohio, about 6,000,000 tons from the former and 93,371 tons from the latter, in 1930, and about 4,000,000 tons from the former and 345,542 tons from the latter, in 1931.

Generally, the coals produced in western Pennsylvania, Ohio, and northern West Virginia are high-volatile coals. The Ohio production is generally accepted as usable for steam and domestic purposes only. The quality of the coal gradually changes as one travels from eastern Ohio in a general southeasterly direction and becomes more of a gas, coking, and special-purpose coal until the Connellsville district of western Pennsylvania is reached, where the coal is a very high-grade coking coal. All of the special-purpose coal is usable for steam and domestic purposes also, and in this respect this coal competes with the Ohio coals, although not all of the Ohio coals are competitive with all of the western Pennsylvania coals. Coal from the Freeport district is used almost entirely for steam purposes, but occasionally for special purposes. A line drawn approximately north and south through the city of Pittsburgh divides the purely steam and domestic coal in the Pittsburgh district lying to the west of the line, from the gas, coking, and metallurgical coals lying to the east of the line. In the Pittsburgh district the coal on the Pittsburgh & West Virginia, the Montour, and the Pennsylvania Lines West, is steam and domestic coal. All the coal on the Baltimore & Ohio, the Pennsylvania Lines East, and the Pittsburgh & Lake Erie is

special-purpose coal. It is estimated that the minimum tonnage of steam and domestic coal shipped from western Pennsylvania districts to Cleveland and Lorain is 71 percent of the total shipments to those two points. A recent year's study shows that over 4,000,000 tons of coal were shipped from western Pennsylvania to northeastern Ohio of which 2,500,000 to 3,000,000 tons consisted of steam and domestic coal competitive with the coal shipped from Ohio.

Numerous retail dealers at Cleveland and other northeastern Ohio destinations testified that since the rates were reduced between Ohio points they have been unable to market coal from the Crescents because of the relatively higher price. They explain that they can shrink their profits to meet the differences in rates that existed prior to August 1, 1932, but since that time the Ohio operators' rates have been so much lower than those from the Crescents that it has been impossible to meet the Ohio competition. A witness for the Pittsburgh Coal Company testified in great detail regarding his lost business at Cleveland since the reductions in Ohio. He classified his customers A, B, C, and D. Class A customers consisted of dealers of whom 10 discontinued buying coal upon the Ohio reductions. Class B customers are those who elected to make no new contracts but continued to buy on spot market basis. All of these customers, numbering 15, were lost after the Ohio reductions, and the tonnage amounted to 646,900 tons annually. Class C customers are those who bought regularly from year to year but under no contract; 60 of these were lost and their tonnage amounted to 149,700 tons annually. Class D are customers who bought from time to time; 39 of these were lost and their tonnage amounted to 123,800 tons annually. Most of these customers are retail dealers and all of this coal was for steam and domestic use. This witness testified that conditions will not change with respect to the marketing of Pittsburgh coal in Ohio until the rate situation is altered.

Another witness, representing a coal producer in the Kanawha and Kenova-Thacker districts, also described his loss of business and difficulty in competing with Ohio mines since the reductions took effect. Similar testimony was given by many other coal operators who have previously shipped their coal to northeastern Ohio to a considerable extent. For example, a witness representing a coal producer on the Monongahela Railway in the Fairmont district estimated that his loss of tonnage to northeastern Ohio would be about 300,000 tons annually because of the reductions made in the Ohio rates. The record is replete with similar instances, including testimony of a representative of the Public Service Commission of Pennsylvania that that State is losing its coal shipments to Ohio and southern

fields and that the restoration of the former relationships in rates with the Ohio fields to northeastern Ohio is vital to the mining districts of Pennsylvania. Witnesses testified that since the reduction in the Ohio rates the tonnage from Ohio mines to Cleveland has increased.

Steam and domestic coal from western Pennsylvania, Virginia, West Virginia, and eastern Kentucky is shipped to northeastern Ohio in competition with Ohio coal. The general tonnage figures are shown in appendix B, but specific figures indicating the kinds of coal sold at these Ohio destinations are in evidence for certain periods of movement. Great quantities of steam and domestic coal move from the Pittsburgh and Fairmont districts to Cleveland, Lorain, South Lorain, Akron, Canton, East Canton, and Massillon. Witnesses testified that steam and domestic coal from interstate points are sold at such points as Canton and Massillon, which are virtually in the Ohio coal fields. One exhibit shows that there was a movement of steam and domestic coal from the Pittsburgh and Fairmont districts to both Canton and Massillon in 1931. The kinds of coal shipped to these points in 1932 are not indicated, but the evidence indicates that the same character of competition between State and interstate shipments continued in that year.

The percentage of bituminous coal to all freight of the following carriers is shown:

	1929	1930	1931	First 6 months, 1932
Baltimore & Ohio	44.71	44.38	45.92	51.73
New York Central	41.47	43.21	42.14	44.81
Pennsylvania Railroad	38.00	40.00	41.36	44.01
Pittsburgh & Lake Erie	41.00	45.00	55.30	62.90

If the present Ohio intrastate reductions and the Pittsburgh & West Virginia interstate reduction continued and spread to other interstate fields, herein affected, the estimated revenue losses to the carriers would be $44,108,248.61 and $29,649,265.34, based on the 1929 and 1931 tonnages, respectively. Detailed figures of the losses of revenue because of the reductions here under consideration will presently be discussed.

Petitioning respondents contend that the former Ohio intrastate rates which they seek to have restored were fairly aligned with the level of interstate rates between representative points. To establish this contention they compare the former rates in Ohio, as indicated in appendix A, with rates from the Pittsburgh district to Ashtabula, Ohio, 162.2 miles, $1.84; to Canton, 143.4 miles, $1.59;

1931, was used in the derivation of unit cost, because it was deemed to be representative by reason of the fact that it was intermediate between the heavy traffic year of 1929 and the low traffic year of 1932.

The coal from the mines in this district is assembled at Pine Valley, Ohio, the Wheeling's principal train terminal in the district and at three other points short distances west thereof. Through trains, handled by one locomotive each, and carrying coal for all of the several destinations, originate at Pine Valley and move through to Brewster, a distance of about 63 miles, where the trains are broken up and the cars of coal are placed in other trains for further movement to the respective destinations. Due to an adverse grade some 9.06 miles in length between Adena and Rexford, the tonnage rating of all classes of locomotives from Pine Valley to Rexford is approximately 50 percent of the rating from Rexford to Brewster. In lieu of operating the through trains out of Pine Valley or Adena with full Rexford to Brewster tonnage rating by furnishing a helper engine to Rexford, the practice is to supplement the through trains by puller train service from Pine Valley and the other assembling points to Jewett, a point about 5 miles west of Rexford. The cars of coal moved from the assembling points to Jewett by the puller trains are placed in the through trains at that point to fill them out to full tonnage rating to Brewster.

The distances from Pine Valley to the respective destinations are shown in the study to be as follows: To Cleveland 138 miles, to South Lorain 137 miles, to Huron 145 miles, to Canton 76 miles, to Massillon 73 miles, and to Akron (Mogadore)[1] 99 miles.

The study is predicated upon the number of service units of each kind involved in assembling the coal, and in moving it in through trains from Pine Valley to each of the respective destinations, and returning the empty cars to the coal district, to which the Wheeling's average freight service operating expense per unit for the respective units is applied. To the estimated operating expense per ton for transporting the coal, to the several destinations, amounts ranging from 1.7 to 2.3 cents per ton are added for deficit from passenger-train operation, these amounts being 2.89 percent of the estimated transportation expense from the coal district to the respective destinations, and this percentage being the ratio of the amount of the deficit from passenger-train operation to the amount of the total freight-service operating expenses.

Inasmuch as trains are not operated through from the coal district to the several destinations, but are broken up at Brewster, it was

[1] Mogadore is the junction with the A., C. & Y.; from this junction the coal is moved to industries in Akron by A., C. & Y. yard engines.

necessary to estimate the number of service units of each kind that would be involved for imaginary or hypothetical trains assumed to be operated through from this district to each of the six destinations. This was approximately done on the basis of data compiled from the conductors' train reports and other records of the carrier, and certain averages derived therefrom.

Petitioning respondents criticize the cost study in various respects. They call attention to the fact that total expenses are combined with total units to develop system averages, and that these are then generally applied to specific operations which are not themselves spread over the system, and say that this is a fundamental objection to cost studies of this kind which has been frequently recognized by the Commission. They point out that maintenance expenses during 1930 and 1931 were drastically reduced, as compared with normal years, on account of the general depression, and testify that such expenses therefore cannot be typical of the expenses during a normal period. In this connection they refer to the fact that the freight-train car-repair expenses in 1931 were less than one half the amount of these expenses in 1930, while the number of serviceable car-days was somewhat greater in 1931 than in 1930. They also claim that the track-maintenance expenses per unit for the 2-year period ended December 31, 1931, used in the study, were substantially less than the corresponding expenses per unit for the 5-year period 1927 to 1931, inclusive. They criticise the methods employed in deriving the system average operating expenses per service unit as being erroneous in several respects, and they claim that not all of the service units involved were taken into account in arriving at the estimated costs of transporting coal to the several destinations. They also point out that the estimated transportation costs do not include the cost of handling company material or nonrevenue traffic.

An analysis of the cost study leaves no doubt that the transportation costs are underestimated to a substantial extent for several reasons.

One of these is the use of the 2-year period ended December 31, 1931, instead of a more normal period, as the basis for the derivation of unit costs. In view of the drastic reductions shown to have been made in the maintenance expenses during this period, it can hardly be regarded as representative of the expenditures per unit normally required to be made for maintenance of way and maintenance of equipment.

Another is the use of hypothetical through trains from the coal district to the several destinations, as the basis for estimating the number of service units involved in transporting coal to these desti-

for application in Illinois, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I.C.C. 537, and from Indiana to *Illinois in Coal Trade Assn. v. Baltimore & O. R. Co.*, 185 I.C.C. 225; 190 I.C.C. 743. Elaborate comparisons were made between the Ohio reduced rates and those prescribed in Illinois territory. This evidence has had our consideration. It is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. This has greatly been brought about by a competitive condition differing from that in the Ohio territory, although some testimony was introduced to indicate that the actual operating conditions in Illinois are not more favorable than in Ohio. Chicago, in the Illinois territory, is the greatest coal market in this country, and, as stated in *Intrastate Rates on Bituminous Coal in Illinois*, *supra*, consumes annually 30,000,000 to 35,000,000 tons of coal. It was also there stated that the rate level to Chicago is the result of keen competition between producers of eastern coal, moved both by rail and water-and-rail, and producers of Illinois and Indiana coals. Like competition also exists between carriers that have their own rails extending from particular groups in Illinois and Indiana to Chicago and whose principal interest is to move coal from their own mines. The rates to Chicago have had a depressing effect upon other rates on bituminous coal in this territory and have resulted in the establishment many years ago of a competitive basis of rates that is on a very low level. These rates have been maintained, more especially to enable Illinois producers to dispose of their coal in competition with eastern coal. The volume of coal consumed at even the largest consuming point in the Ohio territory is strikingly less than consumed at Chicago. This is indicated in appendix B, although the total tonnage to Youngstown is not there shown but heretofore set forth in the text of this report.

The rates in the Indiana-Illinois territory have never been related to the rates in Ohio or Pennsylvania. The State of Illinois, as well as the western part of Indiana, is underlaid with a vast coal deposit from near the northern to the southern boundaries. Farther to the south is the west Kentucky field, likewise producing large quantities of coal competing in the same consuming territory where Illinois and Indiana mine operators must find their markets. Consequently, intense competition exists at every point in the State of Illinois which is a market for coal. Substantially every rate on which coal is moving in this section was established voluntarily by the carriers or by orders of the Illinois Commerce Commission or by us, and these rates have been established with primary regard for competition, and without regard for existing rates in other ter-

ritories. The intense competition within the State of Illinois and Indiana has been the subject considered in numerous cases before us. Coal is not moved from the Indiana-Illinois territory to northeastern Ohio. The conditions that led us to establish the basis of rates in the Indiana-Illinois territory are not present in northeastern Ohio.

Highly competitive conditions on bituminous coal exist in Ohio, but the situation confronting the carriers in that territory differs both in type of influences as well as in intensity.

That rates on various commodities in Illinois territory are lower than rates on the same commodities throughout central territory has been indicated in many cases. For example, this principle finds support in *Durabilt Steel Locker Co* v. *N. Y. C. R.R. Co.*, 144 I.C.C. 232, as to sheet steel; in *Concrete Roofing Slabs*, 107 I.C.C. 335, as to roofing slabs; and in *Royster Guano Co.* v. *M. C. R.R. Co.*, 104 I.C.C. 151, and *Hamm Co.* v. *B. & O. R.R. Co.*, 120 I.C.C. 345, as to sulphuric acid. Similar findings have been made with respect to tar, pitch, scrap iron, and certain other commodities moving under peculiar conditions existing in the Illinois territory. Another striking example of this principle is found with respect to the rates on sand, gravel, and crushed stone, on which lower scales of rates were prescribed in Illinois than in Ohio under thirteenth-section proceedings somewhat similar to the one here presented.

The Pittsburgh & West Virginia also relies to a great extent upon the Indiana-Illinois rates to justify its reductions from the Pittsburgh district to northeastern Ohio destinations. Its reductions corresponded to the reductions made from mines served by it in Ohio No. 8 district. When this respondent undertook to restore the former rates from the Pittsburgh district they were suspended, as previously stated, and constitute the issue in I. and S. No. 3833. Witness for this respondent conceded that the maintenance of a different basis of rates from mines on its line in the Pittsburgh district than from mines on other lines in the same district is improper. At the same time it is the desire of this respondent to maintain the established differential of 10 cents under the Pittsburgh district rates from its mines in Ohio No. 8 to Cleveland and many other northeastern Ohio destinations. Much of the testimony introduced by this respondent has been discussed in other portions of this report and need not be reiterated.

A number of mines, known as river mines, are on or adjacent to the Monongahela, Allegheny, and upper Ohio Rivers. With few exceptions they are of the captive class and ship their coal by river to affiliated iron and steel companies in the Pittsburgh, Steubenville, and Wheeling districts. Most of these mines are in

and 147 tons to Massillon; from Conway 1,759 tons to Cleveland, 1,720 tons to Canton, 29,584 tons to Youngstown, and 14,683 tons to Warren, Ohio; from Colona 16,075 tons to Cleveland, 8,995 tons to Lorain, 41,446 tons to Youngstown, and 25,967 tons to Ceico, Ohio; and from Bridgeport 42,800 tons to Cleveland, and 6,011 tons to Lorain, total 403,011 tons. Prior to July 16, 1932, the river-and-rail movement to those destinations was negligible.

The establishment of the ex-river rates was one of the considerations which led the Wheeling to reduce the rates to Cleveland, Lorain, and other northeastern Ohio destinations effective August 1, 1932. The Pittsburgh & West Virginia immediately applied for and received permission from the Ohio commission to meet the reduced rates of the Wheeling. As previously shown, the other trunk lines serving the eastern Ohio districts reduced their rates, although it was apparent that the reductions would disrupt long-standing differential relationships between interstate and intrastate movements.

A petition to reopen the first and second *Ex-river cases* for rehearing and reconsideration was denied. Later a second petition was filed which was set for oral argument with the present proceedings. The merits of that petition will be considered separately from this report.

The value of comparisons between the charges over the all-rail and rail-and-water routes is dependent upon the accuracy with which the charges to and at the ports can be determined. The tariffs of the Pennsylvania at Conway and of the Pittsburgh & Lake Erie at Colona provide a charge of 12 cents per net ton for transferring coal from barges to cars. The carriers serving the other ports state in their tariffs that they will not furnish services or facilities to effect such transfers and that the charges for any terminal services at the ports will be in addition to the line-haul rates.

The respondents in the second *Ex-river case* asserted that the barge rate was 45 cents per net ton from the so-called sixth pool in the center of the Connellsville district to the Wheeling's river division. The protestants in that case contended that the 45-cent charge was excessive and that coal was being transported in large quantities for 81 cents per net ton from the sixth pool to Weirton, W.Va., across the Ohio River about 7 miles from Mingo Junction.

To determine the present charges for barge movements, the Wheeling purchased four barge loads of coal which were shipped by river-and rail-routes to Canton and introduced evidence concerning them in this proceeding. One of the barge loads was shipped from a Monongahela River mine in the Pittsburgh district, another from

a mine in the Connellsville district, and two were shipped from Ohio River mines in the Pittsburgh district. The coal from the Monongahela River mines was transferred from barges to cars at Conway, and the coal from the Ohio River mines was transferred at Martin's Ferry. The barge charge from the Monongahela mines to Conway was 25 cents per net ton and the transfer charge at that point was 12 cents per net ton. The charges for the river transportation to Martin's Ferry and the transfer at that point were 15 cents per net ton on the coal from one of the Ohio River mines and 18 cents per net ton from the other. There is nothing in the record to indicate that these charges are less than ordinarily would be made for the water transportation and transfer services. The following table sets forth the river-and-rail rates to representative destinations based on the above charges and the all-rail rates from the Pittsburgh, Connellsville, and Ohio No. 8 districts:

	To Canton and Massillon, per net ton	To Cleveland and Lorain, per net ton
River-and-rail rates:		
From Ohio River mines in the Pittsburgh district	[1] $1.39	[2] $1.43
From Monongahela River mines in the Pittsburgh and Connellsville districts	[3] 1.39	[3] 1.64
All-rail rates:		
From Pittsburgh district	[1] 1.59	[1] 1.84
From Connellsville district	1.65	1.90
From Ohio No. 8 district (prior to reductions)	1.36	1.74
From Ohio No. 8 district (present rates)	1.08	1.45

[1] Based on a charge of 18 cents for the water movement and transfer service.
[2] Based on a charge of 25 cents for the water movement and a charge of 12 cents for the transfer service.
[3] Via P. & W. V. Ry. the rate is $1.55.

It is apparent from the above table that the reductions in barge charges disrupted the relationship between rail-and-water and all-rail rates which division 4 in its findings in the second *Ex-river case* sought to establish. It is doubtful, however, if the differences between the rail-and-water rates from the Ohio River mines in the Pittsburgh district and the all-rail rates from mines in the Ohio No. 8 district were sufficient to divert much coal traffic to Canton and Massillon from the all-rail routes. Nor was it necessary to reduce the rates from the Ohio No. 8 district to Canton and Massillon below the rail-and-water rates or the rates from that district to Cleveland and Lorain to approximately the rail-and-water level of rates from the Ohio River mines in order to place the Ohio No. 8 mines on a competitive basis with the Ohio River mines in the Pittsburgh district.

The differences between the all-rail and rail-and-water rates in many instances are too great. That issue is not here presented. Any increase, however, should be sufficient only to permit mines

restricted to all-rail routes to compete with those having river outlets in order to maintain rail-and-water rates on a level which will induce the free movement of coal by barge and encourage and develop water transportation in furtherance of the policy declared by Congress in section 500 of the Transportation Act, 1920. Domestic coal is not ordinarily moved by river because of the degradation that takes place in dumping, but much special-purpose coal and coal for steam purposes used in the iron and steel industry can move by barge without injury, as it is required to be broken up or otherwise disintegrated before usage. As previously stated, the petitions seeking reopening of the *Ex-river cases* to determine this issue are now before us for consideration.

NOS. 25590, 25656, 25670, AND 25657.

The issues raised in the complaint and answer cases include alleged violations of sections 1, 3, and 13 of the act, except no. 25657 which includes only sections 3 and 13. The allegations are shown in the margin.[4]

[4] In no. 25590 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from mines in the Freeport, Pittsburgh (except mines on the Pittsburgh & West Virginia Railway), and Connellsville districts were and are unjust and unreasonable in violation of section 1 of the act; unduly prejudicial against persons and localities in the Pittsburgh district not located on the Pittsburgh & West Virginia Railway, and unduly preferential of competitors located on the last-named railway in violation of section 3 of the act; and unduly prejudicial against persons and localities in the Freeport, Pittsburgh (except mines on the Pittsburgh & West Virginia Railway), and Connellsville districts, on the one hand, and unduly preferential of competitors located in eastern Ohio districts, on the other, in violation of sections 3 and 13 of the act. Reasonable and nonprejudicial rates are sought for the future.

In no. 25656 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from complainants' mines located on the Monongahela Railway in northern West Virginia are unjust and unreasonable in violation of section 1 of the act; unduly prejudicial against complainants and unduly preferential of their competitors located in the Pittsburgh and Connellsville districts in violation of section 3 of the act; and are unduly prejudicial against persons and localities on the Monongahela Railway in northern West Virginia, on the one hand, and unduly preferential of their competitors located in the eastern Ohio districts, on the other, in violation of sections 3 and 13 of the act. Reasonable and nonprejudicial rates are sought for the future.

In no. 25670 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from complainants' mines in the Fairmont district in northern West Virginia are unreasonable in violation of section 1 of the act; unduly prejudicial against persons and localities in the Fairmont district, on the one hand, and unduly preferential of persons and localities in the Pittsburgh district located on the Pittsburgh & West Virginia Railway, on the other, in violation of section 3 of the act; and unduly prejudicial against persons and localities in the Fairmont district, on the one hand and unduly preferential of persons and localities in the eastern Ohio district, on the other hand, in violation of section 13 of the act. Reasonable and nonprejudicial rates are sought for the future.

In no. 25657 it is alleged that the rates on bituminous coal in carloads, to destinations in northeastern Ohio from complainants' mines located in Virginia, West Virginia, and eastern Kentucky are unreasonably prejudicial against persons and localities in Virginia, West Virginia, and eastern Kentucky on the one hand, and unreasonably preferential of their competitors located in the eastern Ohio districts, on the other hand, in violation of sections 3 and 13 of the act. Nonprejudicial rates are sought for the future.

In no. 25590 it appears that the disposition of the issue with respect to the reduced rates from points on the Pittsburgh & West Virginia in the Pittsburgh group in I. and S. No. 3833, and establishment of the relationship that should exist between persons and localities and between interstate and intrastate commerce in no. 25566 will likewise dispose of the cause of the complaint under sections 3 and 13 of the act.

It has already been shown that one of the principal markets for these complainants' coal is in northeastern Ohio and that since the reductions in Ohio the shipments from Pennsylvania have been greatly retarded.

Complainants contend that the rates from the Pittsburgh, Freeport, and Connellsville districts to northeastern Ohio are unreasonable. A typical rate is that from the Pittsburgh district to Cleveland, average short tariff route 162 miles, $1.84 as set forth in appendix A. As the Ohio commission was guided to a great extent in their initial reductions by the scale of rates established from Indiana to Illinois over the short tariff routes in *Coal Trade Assn.* v. *Baltimore & O. R. Co.*, 185 I.C.C. 225, decided May 31, 1932, and termed the first *Indiana-Illinois case*, these complainants also contend that such a scale would be reasonable from the Pittsburgh and other Pennsylvania districts to Ohio destinations. The scale prescribed in the case cited was based to a great extent upon the findings in the *Intrastate Rates on Bituminous Coal in Illinois*, 182 I.C.C. 537. One of the important issues in *Coal Trade Assn.* v. *Baltimore & O. R. Co.*, *supra*, was the establishment of joint rates over so-called tariff routes and upon reconsideration, 190 I.C.C. 743, termed the second *Indiana-Illinois case*, the method for figuring distances beyond 130 miles was revised and confined to the shortest route over which carload traffic can be moved without transfer of lading. In the second *Indiana-Illinois case* the scale was increased about 5 cents per ton to compensate for the method of calculating distances over the shortest routes. In the present case there is no issue of esablishing tariff routes, and no necessity for determining the distances over the shortest routes over which traffic does not move for the purpose of measuring or comparing rates. Adequate evidence was introduced to show the average short tariff routes from the districts under consideration. The comparisons in the present case are made principally with the scale of rates in the first *Indiana-Illinois case*, as reconsideration of that case did not take place until during the pendency of the hearings in the present case. A rate of $1.65 was prescribed in that case over the short tariff route for distances of 180 miles and over 160 miles. Upon reconsideration

of that case a rate of $1.70 was prescribed for the same distance but over the shortest route over which carload traffic can be moved without transfer of lading. Numerous comparisons with the scale prescribed in that case were introduced and have had our consideration. Discussion of the different influences in Illinois territory than to destinations in Ohio appear elsewhere in this report.

As previously stated, in *Youngstown Sheet & Tube Co.* v. *P. & L. E. R.R. Co.*, *supra*, decided February 3, 1914, we found a rate of 70 cents from the Pittsburgh district to Youngstown, 96.4 miles, not unreasonable. That rate, subjected to the general increases and reductions, has since become $1.34. The rate for this distance under the first *Indiana-Illinois case* would be $1.22 and under the second case would be $1.27, or 5 cents higher. Cleveland has uniformly taken a differential of 50 cents over the rate to Youngstown on coal from the Pittsburgh district.

Connellsville district takes 6 cents over Pittsburgh on coal traffic to most northeastern Ohio destinations. The rate from Connellsville to Cleveland, 216.4 miles, is $1.90 or only 5 cents greater than prescribed in the first *Indiana-Illinois case*.

The complainants undertake to measure the rates from Pittsburgh, for example, by the Holmes & Hallowell scale prescribed in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, 37 I.C.C. 627; 60 I.C.C. 687; 69 I.C.C. 11; 77 I.C.C. 683, hereinafter termed the H. & H. scale. That scale was prescribed for application on coal, from the head of the lakes to various points in the States of Minnesota, North Dakota, and South Dakota. That scale for 162 miles, the distance from Pittsburgh district to Cleveland, is $1.97. The present rate of $1.84 from the Pittsburgh district to Cleveland is about 93.5 percent of the H. & H. scale, and the rate from Connellsville district, a differential group, is $1.90 or 81.5 percent of the H. & H. scale. Some of the differential groups in Ohio are now on as low a basis as 61 percent of the H. & H. scale. The reduced rate of $1.45 from Ohio No. 8 to Cleveland, average short tariff route, 128.2 miles, is about 86.5 percent of the H. & H. scale and the former rate, prior to August 1, 1932, was $1.74 or 102 percent of the H. & H. scale. The present rates to Cleveland, for example, are the following percentages of the H. & H. scale: From Pomeroy district, 252.5 miles, $1.60, 61 percent; from Hocking district, 199.3 miles, $1.60, 73 percent; from Crooksville district, 170.9 miles, $1.47, 72 percent; from Cambridge district, 176.1 miles, $1.45, 71 percent; from Massillon district, 75 miles, $1.08, 84 percent; from Middle-Coshocton district, 104 miles, $1.22, 80 percent; and from Middle district, 92.6 miles, $1.22, 84 percent.

The rates in Ohio, even before the reductions of August 1, 1932, and later dates, were, taking the territory as a whole, on a somewhat lower percent of the H. & H. scale than the rates from the Pittsburgh or Connellsville districts to northeastern Ohio. Whenever comparisons are made between rates from differential groups with those from base groups or for short hauls where group adjustments covering a wide territory are considered, an anomalous rate adjustment appears from the measure of distance. Complainants rely in a measure upon such comparisons to show that the reduced rates in Ohio are not less than minimum rates. They compare the reduced rate of $1.45 from Ohio No. 8, the base group or nearby group, to Cleveland, 128.2 miles, with a rate of $1.42 from Connellsville district, a differential group, to Youngstown, 142 miles. Upon the same theory of comparison a rate of $1.89 from the Pomeroy district, a differential group, to Cleveland 252.5 miles, in effect prior to the reductions under consideration, can be shown to be substantially less than a minimum rate in comparison with a rate of $1.84 from Pittsburgh district, the base group, to Cleveland, 162 miles, tested by any distance measure. The former is 72.5 percent of the H. & H. scale and the latter 93.5 percent of the rates under that scale. A substantial volume of coal moved from Ohio No. 8 to Cleveland prior to the reduction in the rate from $1.74 to $1.45, but that movement is hardly comparable with the great volume that moves from Connellsville to Youngstown.

The *Holmes & Hallowell cases* were the outgrowth of rate legislation in the State of Minnesota. The maladjustment between interstate and intrastate rates made it necessary to determine a common level of reasonable interstate and intrastate rates as a basis to remove the undue prejudice and preference there found to exist. We clearly indicated in that case that had we been concerned with the interstate rates alone justification might have been found for a higher basis than there prescribed and at the same time been within the flexible limits of judgment respecting reasonable rates. It was shown in that case that ideal transportation conditions prevailed from the head of the lakes to the Twin Cities. Coal reshipped from the head of the lakes originates in eastern fields, and prior to such reshipment has borne charges for rail-and-lake transportation. Difficult assembly service is shown in the present case. No such service is necessary in the reshipment of coal from the head of the lakes. That scale was constructed in the light of the special traffic, transportation, and other conditions there existing. Because of the dissimilarity of the conditions we cannot accept the H. & H. scale as an appropriate yardstick by which to measure the rates here in issue. This same view was expressed in the *Eastern Bituminous Coal In-*

vestigation, 140 I.C.C. 3, and *Bedford Pulp & Paper Co.* v. *Chesapeake & O. Ry. Co.*, 168 I.C.C. 670.

The Cleveland Chamber of Commerce, intervener, also refers to the 70-cent rate from Pittsburgh district to Youngstown, found not unreasonable in *Youngstown Sheet & Tube Co.* v. *P. & L. E. R.R. Co.*, *supra*, and points out that at that time the Middle-Coshocton-Massillon rate to Cleveland was also 70 cents. The average short tariff route in each instance is about the same, the former being 96.4 miles, and the latter 104 miles. This parity continued through the 15 percent increase in *The Fifteen Per Cent Case*, 45 I.C.C. 303, and until June 24, 1918, when both rates were 85 cents. Since that time and until the Ohio State reductions August 1, 1932, both of these rates were subjected to the same general changes but the application of different methods resulted in a rate of $1.34 from Pittsburgh to Youngstown and $1.54 from the Middle-Coshocton-Massillon district to Cleveland. As a rule the general changes in rates were applied on bituminous coal to the rates from the base groups and the differential relationships between mining groups were maintained to preserve the competitive conditions that existed prior to the changes. This principle we approved on bituminous coal in this territory. *Increased Rates, 1920*, 58 I.C.C. 220, 248. Intervener contends in substance, that the application of that principle has resulted in unreasonable rates in the State of Ohio. To follow the principle of applying the same percentage increase or decrease to the rates from each group, advocated by this intervener, would destroy the competitive relationships between mining groups, and the application of any general change in rates would compel shippers to seek new markets for their coal. We cannot subscribe to this theory on bituminous coal in this territory.

The Republic Steel Corporation, intervener, with plants located at Youngstown, Massillon, and Canton, and with mining interests in the Freeport district, contends that the rates from that district which are the same as from the Pittsburgh district to most destinations in northeastern Ohio, should be lower than those from the Pittsburgh district. Intervener has mines at Russellton, Pa., located on the main line of the Bessemer & Lake Erie Railroad Company, 23.3 miles south of Butler, Pa., and 9.8 miles north of Unity Junction, which marks the southern boundary of the Freeport district on the Bessemer & Lake Erie. The coal mined from this district is said to be from the Freeport seam and not from the Pittsburgh seam. The coal produced in the Mercer-Butler coal-rate group, which lies immediately north of the Freeport district, and from which the rates to northeastern Ohio destinations are lower than the rates from the Pittsburgh rate district, is also from the Freeport seam.

Intervener points out that the lake-cargo coal rate from the Freeport district to Conneaut, Ohio, is 15 cents less than from the Pittsburgh group. To destinations on the New York, Chicago & St. Louis Railroad, rates published from the Freeport group on the Bessemer & Lake Erie are 10 cents less than from the Pittsburgh district, to Oak Point, Ohio, and other stations west thereof as far as Chicago. Oak Point is a few miles west of Lorain. To Ashtabula, Ohio, on the New York Central, which is north of the Youngstown destination group, the Freeport district rate is 15 cents under that from the Pittsburgh district, and to Andover, Ohio, on the same line the rate is 31 cents lower from the Freeport district than from Pittsburgh district. Certain other specific points of destination are selected on the the Erie and Chicago & Erie Railroads to which there is a lower rate from the Freeport than from the Pittsburgh district.

It is argued that the Freeport district is a separate and distinct coal-producing district and should, to Youngstown, Canton, and Massillon, be separated from the Pittsburgh district. Youngstown is the only important destination in northeastern Ohio to which the distance from the Freeport district is less than from the Pittsburgh district. To Cleveland, Lorain, Akron, and Painesville, Ohio, the distances from the Freeport district are the same or greater than the distances from the Pittsburgh district. To Youngstown, the average distance from the Freeport district is 83 miles, from the Pittsburgh district 96.4 miles.

Other testimony of the same general nature was introduced to establish the contentions of this intervener. This evidence cannot be set forth in full in a report of this nature. It is sufficient to say that consideration has been given the record on the question of separating the Freeport from the Pittsburgh district and we find that the evidence of record does not warrant such action.

Defendants who are also petitioning respondents in the thirteenth-section proceedings insist that the interstate rates from western Pennsylvania and northern West Virginia are reasonable. They show rates from Pittsburgh district to Warren, 218.2 miles, $2.09, and to Oil City, Pa., 164.5 miles, $1.84; to Warren, from Reynoldsville district, 84.5 miles, $1.50, and from Fairmont district, 115.7 miles, $1.70; from Lawsonham district, 122.9 miles, $1.80; and from Aladdin district, 123.4 miles, $1.80. Eastbound rates from the Cumberland-Piedmont district are, to Hagerstown, Md., 137 miles, and to Waynesboro, Pa., 156 miles, $2.08; to Union Bridge, Md., 179 miles, $2.20; from Reynoldsville district to Olean, N.Y., 86 miles, $1.90; and from Clearfield district to Elmira, N.Y., 203.9 miles, $2.31. These rates are generally representative of the coal rates

prevailing in this territory and were either prescribed or approved by us. They also point out that the rates already instanced in support of the contention that the former Ohio intrastate rates were reasonably aligned with the rates in this general territory likewise support their contention that the present interstate rates from the territory under consideration to Ohio destinations are not unreasonable. These comparisons need not be repeated here.

In no. 25656, since the hearings began, H. W. Showalter, receiver, Continental Coal Company, was substituted for one of the complainants, Continental Coal Company, in this particular complaint. Allegations under sections 1, 3, and 13 of the act are presented. Rates from points on the Monongahela Railway in northern West Virginia in the Fairmont district are 9 cents over the rate from the Connellsville district to Cleveland, for example. The mines of complainants are nearer the Pennsylvania State line than the other origins in the Fairmont group and it is contended that the rates to northeastern Ohio generally should not exceed the rates from Pittsburgh by more than the differential of 6 cents applicable from the Connellsville group. The rate to Youngstown, it is contended, should not exceed that from the Pittsburgh group by more than 8 cents. The average short tariff route distance from the Fairmont district to Cleveland is 247 miles; from the Connellsville district, 216.4 miles; and from the Pittsburgh district, 162 miles.

More than 17,000,000 tons of bituminous coal moved from points on the Monongahela Railway in each of the years 1927, 1928, and 1929. In 1930 over 15,000,000 tons; in 1931 over 12,000,000 tons; and during the first 11 months of 1932 about 8,500,000 tons moved from the Monongahela. Most of this tonnage moved northbound to Ohio and other points beyond. One of the complainants shipped about 500,000 tons of coal to northeastern Ohio in 1930, and 400,000 tons in 1931. Over 95 percent of the Monongahela's revenue is derived from coal traffic.

Evidence of record shows that coal from points on the Monongahela is marketed at destinations in northeastern Ohio, including Cleveland and many other principal consuming points in that territory, in competition with coal from eastern Ohio district as well as from Pittsburgh, Connellsville, and other Crescent districts, and that since the reductions in the Ohio rates sales have been materially reduced and in some instances completely prevented.

Under the adjustment existing prior to the Ohio reductions, complainants were practically precluded by the high differentials from shipping coal to Canton and Massillon. The differentials from the Fairmont district were 33 cents over those from Ohio No. 8 dis-

trict, now they have been increased to 51 cents. Cleveland and Akron were the principal destinations to which these complainants made shipments but since the reductions in Ohio they are precluded from shipping to any point in northeastern Ohio unless they assume large losses incident to absorption in their mine prices of the increased differentials now existing.

Complainants figure the average short tariff route from that portion of the Fairmont district on the Monongahela Railway, from which the rates are assailed, to Cleveland 234.7 miles, to Lorain 250.9 miles, to Canton 191.3 miles, and to Akron 218.1 miles. The rate from the Fairmont district on the Monongahela Railway to the first two destinations is $1.99 and to the two others $1.84 and $1.87, respectively.

The average short tariff route distance from active mines in the Pomeroy group to Cleveland is 252.4 miles, and the former rate $1.89. From active mines in the Jackson district in Ohio to Cleveland the distance is 294.5 miles, and the rate also $1.89. Other similar examples are given with respect to Ohio rate districts but the most remote differential groups are selected for the purpose of comparison. Comparisons with the first Indiana-Illinois scale are also presented. It is contended that the relationship of the rates from northern West Virginia on the Monongahela Railway is unduly prejudicial against complainants' mines and unduly preferential of mines in the Pittsburgh and Connellsville groups.

In 1914 the Monongahela Railway was extended southward to Fairmont, W.Va., and mines on the new portion of the line were given the same rates as the portion in Pennsylvania, namely, the Connellsville basis. The Monongahela mines in West Virginia were continued as a part of the Connellsville group until August 30, 1917, when this parity was disturbed as the result of, but not required by, the order in *Bituminous Coal to C. F. A. Territory*, *supra*. Connellsville district, prior to this order, took 15 cents over Pittsburgh district to affected territory and Cleveland and Youngstown. That proceeding involved rates primarily to affected territory, west of northeastern Ohio territory here under consideration, but certain producers in the Connellsville group intervened in that case and specifically raised the issue of the relationship between the rates from their mines and mines in the Pittsburgh group to northeastern Ohio. No such issue was raised as to rates from points on the Monongahela in West Virginia. As the result of the presentation of the Connellsville group operators we found that the then existing differential of 15 cents, Connellsville over Pittsburgh, was unlawful, and that the differential should not exceed 6 cents to

Cleveland and other points in northeastern Ohio east of the Sandusky-Galion line, except that to Youngstown and points taking the same rates the differential should not exceed 8 cents over Pittsburgh. Mines on the Monongahela were retained on the old basis of 15 cents over Pittsburgh, which was also the basis from mines on the Baltimore & Ohio in the Fairmont district groups south of the Monongahela. Complainants contend that the report in the case last cited erroneously refers to the mines on the Monongahela in West Virginia as a part of the Fairmont group to affected territory. It is testified that at that time these mines were a part of the Connellsville group both to affected territory and northeastern Ohio, and that the Fairmont groups on the Baltimore & Ohio took the same rates as the Pittsburgh group to affected territory, whereas the Connellsville group had rates 15 cents higher. Since the decision in the last-mentioned case, all of these groups have been on a parity to affected territory. The report in that case indicates that the average distance, Connellsville district over Pittsburgh district is 45 miles to Cleveland. The present case shows a difference of 54.4 miles between the average short tariff routes from Pittsburgh and from Connellsville districts to Cleveland. The average distance from the particular mines on the Monongahela which complainant contends should take lower rates than those applicable from the Fairmont group is 18.3 miles greater to Cleveland than the average distance from the Connellsville district to the same destination. The Monongahela mines take 9 cents over Connellsville to Cleveland, Lorain, and Akron, and 19 and 22 cents over Connellsville to Canton and Massillon, respectively. Distances from mines on the Baltimore & Ohio in the Connellsville district are compared with those from active mines on the Monongahela Railway in West Virginia, as follows:

To—		From Baltimore & Ohio	From Monongahela
		Miles	*Miles*
Cleveland	Short tariff route	242.2	234.7
Do	Average of routes [1]		242.8
Lorain	Short tariff route	267.8	250.9
Do	Average of routes [1]		259.9
Canton	Short tariff route	227.2	191.3
Do	Average of routes [1]		211.9
Akron	Short tariff route	208.0	218.1
Do	Average of routes [1]		233.5
Massillon	Short tariff route	215.2	187.9
Do	Average of routes [1]		205.9
Mansfield	Short tariff route	266.6	258.5
Do	Average of routes [1]		275.2

[1] Average of short tariff routes of B. & O., P. & L. E., and P. R.R.

With the exception of the distances to Akron, the short tariff-route distances and the average distance via the short routes of the three connecting lines with the Monongahela are in every instance shorter than the short tariff-route distances from mines on the Baltimore & Ohio in the Connellsville district. Of the 78 active mines in the Connellsville district in Pennsylvania, 32 are on the Baltimore & Ohio, 30 on the Monongahela, 14 on the Pennsylvania, and 2 on the Pittsburgh & Lake Erie. Another comparison is made of the average short tariff-route distances from points on the Monongahela Railway in Pennsylvania taking the Connellsville district rates with those from points on the same railway in West Virginia taking the Fairmont district rates, as follows:

From Monongahela Ry. to—	Mines in Pennsylvania	Mines in West Virginia	From Monongahela Ry. to—	Mines in Pennsylvania	Mines in West Virginia
	Miles	*Miles*		*Miles*	*Miles*
Cleveland	226.6	242.8	Akron	206.3	223.5
Lorain	251.5	259.9	Massillon	201.4	205.9
Canton	205.1	211.9	Mansfield	270.5	275.2

The rates from points on the Monongahela in both Pennsylvania and West Virginia are on the Connellsville district basis northbound to Buffalo, N.Y., and other points in that area. Rates from complainants' mines to eastern destinations are on the same basis as those from the Connellsville district.

Other evidence is given indicating that the operating conditions are favorable from points on the Monongahela; that the operating costs of the Monongahela are relatively low; and that there has been a decline in the production of coal on that line.

Defendants rely upon the same rate comparisons here as indicated in the discussion of no. 25590, to support their contention that the rates assailed in no. 25656 are not unlawful.

We are not satisfied at this time that the factor of distance should be given the weight urged by complainant, and this is especially true as it is shown that the largest mines on the Monongahela are on branch lines. The major question presented on this record is the relationship between State and interstate rates and the expeditious disposition of that issue is more vital to the majority of the parties in this proceeding than the splitting of the Fairmont group. The latter issue will be reversed for further consideration.

In no. 25670 violations of sections 1, 3, and 13 are also alleged. Complainant's mines are also located in the Fairmont district and

market their coal to a great extent in Ohio. The "Fairmont district" is not strictly a tariff designation and the description of the territory is not quite the same by all witnesses. In the present complaint it means the Fairmont No. 1, Monongah, Short Line, Opekiska, and Clarksburg districts on the Baltimore & Ohio Railroad, the Fairmont district on the Western Maryland Railway, and the districts on the Monongahela Railway, variously known as Fairmont No. 2, Group C, and Group No. 3, comprising parts of Monongalia, Marion, Harrison, and Taylor Counties in northern West Virginia.

The restoration of the rate relationships between origin districts which existed prior to August 1, 1932, will substantially satisfy the complainant, provided the rates are not increased. The allegations under section 1 are not stressed, except that attention is directed to the fact that two of this complainant's mines are located on the Monongahela in northern West Virginia and in the same general territory as the mines of complainants in no. 25656.

In 1931, Ohio mines furnished the destination territory under consideration 3,161,600 tons, or 34.6 percent, and Fairmont 1,058,366 tons, or 11.6 percent. The immediate effect of the rate reduction in Ohio is shown by the following table of the percentages in total coal movement to the principal destinations in northeastern Ohio for the first seven months of 1932, combined, and for each of the remaining months after August 1, 1932, when the reductions took place:

	From Ohio No. 8, Cambridge and Middle districts	From all Ohio	From Fairmont		From Ohio No. 8, Cambridge and Middle districts	From all Ohio	From Fairmont
	Percent	Percent	Percent		Percent	Percent	Percent
January–July 1932	34.5	34.9	13.1	October 1932	43.8	46.5	8.1
August 1932	30.7	31.1	10.5	November 1932	53.9	55.7	7.0
September 1932	41.2	42.1	7.5	December 1932	55.6	57.2	7.[illegible]

Complainant ships approximately 10 percent of its commercial shipments from the Fairmont district into northeastern Ohio and its witnesses testified in great detail as to the severe competition it is thus required to meet, particularly with producers mining coal in the Pittsburgh seam in the Pittsburgh and Ohio No. 8 districts, and to some extent in the Connellsville district.

Prior to August 1, 1932, the rates to Cleveland from the Fairmont district were 15 cents higher than from the Pittsburgh district, and 25 cents higher than from the Ohio No. 8 district. To Cleveland, the Fairmont rates are now 54 cents higher than from Ohio No. 8 district, and 44 cents higher than from mines on the Pittsburgh & West Virginia in the Pittsburgh group over that line

in connection with the Wheeling & Lake Erie. This complainant, since the Ohio reductions, has been able to sell a diminished amount of coal in northeastern Ohio because of its grade of coal and efficient and modern methods of preparing its product.

Complainant's former differential over Ohio No. 8 was 25 cents, to which has now been added 29 cents, total 54 cents, or an increase of 116 percent. Its witnesses testify that it is practically impossible to overcome at Cleveland, for example, the competitive burden that has been more than doubled. The interval between the increase in this differential and the first hearing in the present proceedings was too short to obtain accurate figures to show the full extent of lost business. Great sacrifices were made in a financial way to retain complainant's trade throughout September and October 1932. Early in August 1932, complainant estimated that on the original differential basis existing from the competitive groups its reasonable expectancy of contract business still to be secured, plus contract business already on its books, and on spot sales to be made during the period from August 1, 1932, to March 31, 1933, would be approximately 200,000 tons, or, roughly, from 20,000 to 30,000 tons per month for the 8 months' period. Despite its unusual efforts to retain its business it lost approximately 66,000 tons of this business to the middle of December 1932, when the testimony was introduced. This complainant's contract with a large tire and rubber company expired December 13, 1932. The contract was not renewed because of the reductions in Ohio. Other similar losses of business are shown. As previously stated, complainant is seeking the continuance of the differentials that existed prior to August 1, 1932, between the Ohio No. 8 and the Fairmont district.

The Ohio commission reduced the rate to Cleveland, for example, to $1.47 from Crooksville, and $1.60 from Hocking and Pomeroy districts for distances, shown by one witness, of 171, 199, and 252 miles, respectively, whereas rates on the basis of the scale prescribed in the first *Indiana-Illinois case* would result in rates of $1.65, $1.75, and $2.02, respectively. The prior rate was $1.89. It is contended that the differences between the rates from Ohio No. 8, Pittsburgh, Connellsville, and Fairmont districts, as well as a part of the Cambridge district, and including the Moundsville district in the Panhandle of West Virginia, should be less rather than greater than they were prior to August 1, 1932, as they all mine coal from the same seam, the Pittsburgh seam. In great detail the various coal seams are described but it is deemed unnecessary to discuss the details of this testimony. *Wisconsin & Arkansas Lumber Co. v. St. L., I. M. & S. Ry. Co.*, 33 I.C.C. 33, is cited to support the contention that the blanket system of rates rather than greater differentials

should exist in cases of the nature here presented where coal is mined to a great extent from the same seam.

Defendants likewise rely upon their rate comparisons already discussed to support the contention that the rates here assailed are not unlawful.

The issue here presented with respect to the rates to be applied from the two mines on the Monongahela located in the same territory as those described in no. 25656, reserved for later consideration, will also be reserved for consideration with the rates in no. 25656.

In no. 25657, violations of sections 3 and 13 are alleged. This complainant's mines are located in Virginia, southern West Virginia, and eastern Kentucky, and to some extent in Tennessee. The districts are generally described as the Pocahontas, New River, Winding Gulf, Kanawha, Logan, and Williamson (Kenova-Thacker). Most of the defendants admitted in their answers and contend in no. 25566 that there is a violation of section 13 as alleged by this complainant. The Wheeling, the Lorain & West Virginia, and Akron, Canton & Youngstown deny the allegations of this complaint. Complainant contends that since the portion of the territory of destination served by the latter carriers is a minor portion of the territory involved, the burden cast upon it to establish its contentions is comparatively light.

The rates generally from the districts under consideration to Cleveland and many of the other destinations in northeastern Ohio are $2.39 and $2.64. The Kanawha district, for example, takes a differential of 50 cents over the Hocking district. It is pointed out that that differential has now been increased by 29 cents. Hocking district takes 15 cents over Ohio No. 8 to Cleveland for a greater distance of about 100 miles, while the Kanawha district to the same destination is now required to pay 79 cents over Hocking for a greater distance of about 100 miles. If distance were the rule of thumb to measure differentials it is apparent that either the 15-cent or 79-cent differential is unwarranted. The influences leading to this disparity are not apparent on the record. Mileage has always been disregarded to a very great extent in making coal rates from the Appalachian field. See also *Lake Cargo Coal Rates*, 46 I.C.C. 159, 188; *Ohio-Michigan Coal Cases*, *supra*.

Tables showing the reductions in shipment from complainant's mines to the principal destinations in Ohio are shown in great detail for the last few years. The coal that displaced that from complainant's mines originated in Ohio No. 8 and Hocking districts. Even before the 29-cent reduction in the rates in Ohio, complainant's operators began to lose business, because of a rumor that a reduction was contemplated, and it is testified that the additional handicap of 29

cents will prevent many of these origin points from selling any coal in the destination territory in northeastern Ohio. It is true that part of the loss of business has been caused by the depression and the desire of consumers to use coal costing the least money, yet these causes have been accentuated further by the reduction of rates in Ohio. The Williamson field in the last year or so has lost 35 percent of its tonnage; 57 percent in northern Ohio generally, and 81 percent to the five destinations in northeastern Ohio to which the rates were reduced from eastern Ohio districts. Dealers in Ohio testify that formerly West Virginia coal was handled but Ohio coal has now been substituted because of the lower delivered price. Coal from points on the Norfolk & Western declined during the first 10 months of 1932, 58.4 percent to Cleveland; 91.6 percent to Canton; 84.2 percent to Lorain; and 89.6 percent to Massillon. This is virtual exclusion from these markets. Testimony indicates that the very large percentage of coal that moves to Canton and Massillon from interstate districts is special-purpose coal consisting of high-volatile and low-volatile coking coals and of gas coal. Only a relatively small volume of the interstate shipments consists of steam and domestic coal. It is indicated elsewhere in this report that steam and domestic coal moved from the Pittsburgh district to both Canton and Massillon in 1929, 1930, and 1931. Most of the latter coal moves from the Ohio mines to these destinations as the rates are relatively lower than from the Inner Crescent and Outer Crescent. The intensity of the competition is not determined by the actual volume of movement. The record contains testimony of numerous retail dealers that they have lost business since the reductions in the Ohio rates. This testimony has been carefully considered but it is deemed that to narrate further testimony of this nature would be merely cumulative.

EFFECT OF REDUCED RATES ON CARRIERS' REVENUES

Operating revenue and expense data are set forth to demonstrate the need of carriers in the eastern district for additional revenue and the further shrinkage of revenues that would result if interstate rates on coal are reduced to the level of the Ohio intrastate rates. Operating revenues in the eastern district reached their peak in 1926, when all class I carriers, including the Pocahontas lines, earned 5.52 percent on their book investment, plus net additions and betterments. If the Pocahontas lines are excluded from the computations the earnings were 5.16 percent. There was a steady decline in the rate of return in 1927 and 1928, a slight improvement in 1929, and a very marked decline each year thereafter. The earnings for 1931 were 2.24 percent if the Pocahontas lines are included, 1.89 percent if

they are excluded. The Pocahontas lines, as a group, earned 8.55 percent in 1929, 6.80 percent in 1930, and 5.36 percent in 1931.

The operating ratio was lowest in 1929 when, for all carriers in the eastern district, 20.3 percent of the total operating revenues were available for fixed charges, dividends, and surplus. If the Pocahontas lines are excluded from the list of carriers, 19 percent of the total operating revenues were available for these purposes. For the first nine months of 1932 this percentage had dropped to 12 and 9.9 percent, respectively. The lines in the eastern district as a whole earned their fixed charges 2.52 times in 1929, and only 1.26 times in 1931. For the first nine months of 1932, there was a deficit of $25,720,000 under fixed charges. Forty-three out of a total of 68 class I roads in the eastern district operated at a loss for this period.

The aggregate deficit of the 43 lines was $68,443,416 and the aggregate deficit of 8 roads affected by the reduced rates on coal was $29,598,000, or approximately 42 percent of the total. Only one line, the Pennsylvania, among those affected by the reduced rates on coal had a surplus after payment of fixed charges, and this surplus was only slightly greater than the revenue accruing to it under the emergency charges recently authorized for a temporary period. The deficit of the Baltimore and Ohio for the first nine months of 1932 was $5,837,202. The reduced intrastate rates based on its intrastate coal tonnage to the principal consuming points in Ohio in 1931, would result in a reduction of $226,000 in the revenues of this line.

The principal coal-carrying roads have estimated the reduction in revenues that would result if the interstate rates from mines in Pennsylvania, Virginia, and West Virginia to Cleveland, Lorain, Akron, Canton, Massillon, Alliance, and other important consuming points in northeastern Ohio are reduced by the same amounts as applied to the intrastate rates. The reduction on the Pennsylvania would be $948,447 if based on 1929 tonnage, and $516,400 if based on 1931 tonnage. The estimated reduction in revenue for other lines based on 1931 tonnage is as follows: New York Central, $202,666; Pittsburgh & Lake Erie, including tonnage received by it from the Monongahela, the Montour, the Pittsburgh, Chartiers & Youghiogheny, and the Pittsburgh & West Virginia in Pennsylvania, $331,375; and Baltimore and Ohio, $215,000. The Norfolk & Western estimates a reduction in revenue of about $500,000 based on its 1929 tonnage.

If a corresponding reduction were made in the interstate rates to all destinations in central territory, it would result in a loss of revenue based on 1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291 for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie. Coal tonnage constituted 55.3 percent of the

total freight tonnage of the latter line in 1931. The effect that a reduction in interstate rates on coal to Ohio will have on the revenues of other lines is not shown in specific amounts but there is a substantial volume of coal destined to Ohio which is originated on or carried by the Pocahontas lines and by such lines as the Montour, and Monongahela, and the Pittsburgh & West Virginia, which derive the greater portion of their revenue from coal traffic. Far greater losses would result if the reductions were reflected to related territories and this greater estimated loss on account of maintaining existing relationship of rates has been discussed in the early part of this report.

Mines on the Chesapeake & Ohio in West Virginia and Kentucky in 1931 produced 42,967,949 tons of coal of which about 75 percent moved westbound to destinations in Ohio and beyond. Mines on this road in Ohio in 1931 produced 958,560 tons of coal which was marketed principally in Ohio, southern Michigan, and northern Indiana. Coal traffic is accountable for approximately 60 percent of tonnage and revenue of the Pittsburgh & West Virginia, and that line had an operating deficit of $415,113 for the first 11 months of 1932. The reduction in intrastate rates by the Wheeling on August 1, 1932, as previously shown, increased the differential between mines in Ohio No. 8 group on that line and mines in the Pittsburgh district on the Pittsburgh & West Virginia from 10 cents to 39 cents. Four mines on the Pittsburgh & West Virginia in the Pittsburgh district shipped 7,286 tons to Cleveland in July and only 1,141 tons and 1,234 tons in August and September, respectively. The 10-cent differential was restored by a reduction in the rates from the Pittsburgh group on October 5, 1932, and these four mines shipped 10,908 tons and 15,239 tons to Cleveland in October and November, respectively.

SUMMARY

The rate adjustment in the territory under consideration is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this Commission. Mining properties outside the State of Ohio have been located and developed with heavy investments in facilities under the rate relationships existing prior to the reductions in the State of Ohio, and these properties are now being financially and physically seriously affected. One of the complainants has become bankrupt since the filing of its complaint, and others are on the verge of disaster. The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads.

Not only is the truck being used to affect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Apparently this form of competition is increasing as good roads are being built. Petitioners in the present proceeding do not contend that the competition of trucks is so great as to justify the reduced rail rates in Ohio. The record fully establishes that coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant. We are asked to prescribe reasonable rates from the Pittsburgh and certain other groups to northeastern Ohio as well as to remove undue prejudice against interstate coal producers and unjust discrimination against interstate commerce. Under the circumstances here presented such rates should be determined with great regard for the value of the service to the shipper and the existing competitive conditions. Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this Commission was organized.

Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago.

Appendix B clearly indicates that in normal times coal moves freely from the Inner Crescent and Outer Crescent districts to northeastern Ohio in substantial volume, and indeed, under abnormal conditions a very substantial movement of coal from these origins moved to Cleveland and other destinations in the same territory prior to the reduction in the Ohio rates. The interstate rates assailed as unreasonable prior to the Ohio reductions, did not prevent a substantial movement of coal to these Ohio destinations greatly in competition with Ohio mines. Under such circumstances and in view of the closely woven relationships of these rates under which the industry in this territory has been fostered, and particularly the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant the disruption of the long existing relationship of rates or the reduction of the interstate rates. That convincing proof does not appear on the present record.

Petitioning respondents submit that if the Ohio reductions remain in effect it will be necessary to resort to reductions from interstate districts to maintain the long established relationships. The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce, and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio.

FINDINGS

The record definitely establishes that coal from Pennsylvania, West Virginia, and Ohio mines is highly competitive at Cleveland and other destinations in northeastern Ohio to which the assailed rates apply and that there is a substantial movement of the coal from those points to such destinations. It further appears that the movement of such coal from the Ohio points or groups and to the Ohio territory outlined in appendix D is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other; that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled.

We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, except that the measure of the rates from points on the Monongahela Railway in northern West Virginia, and their relation to the rates from the Pittsburgh and Connellsville districts will be reserved for further consideration.

We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio.

We further find that from the points or groups and to the territory outlined in appendix D to this report the assailed Ohio intrastate

rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act.

Such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in Appendix D.

We further find in I. and S. 3801 that the reduced rates from the Pittsburgh group on the Pittsburgh & West Virginia to destinations in northeastern Ohio here under investigation have not been justified except to the extent that they may not be less than the present rates from the remainder of the Pittsburgh group to the same destinations, herein found reasonable. These rates should be promptly canceled and rates established from and to these points on a basis not less than those applicable from the remainder of the Pittsburgh group to the same destination.

We further find in I. and S. 3833 that the proposed rates from the Pittsburgh group on the Pittsburgh & West Virginia to Ohio destinations here under consideration have been justified. This order of suspension will be vacated, and the proceedings in I. and S. 3801 and 3833 discontinued.

Under prejudice against complainants and undue preference of Ohio operators exists in connection with the rates on bituminous coal to destinations in northeastern Ohio. It is not deemed necessary to name the individual destination points, other than those specifically mentioned, which cover the entire portion of the State under consideration as the disposition of the issues in no. 25566, we believe, adequately disposes of the issues raised in this connection under sections 3 and 13 of all of the complaints to the extent justified on the evidence presented, except that the measure of the rates in nos. 25656 and 25670 from points on the Monongahela Railway in northern West Virginia and their relationship to the rates from the Pittsburgh and Connellsville districts, will be reserved for further consideration.

Appropriate orders in accordance with the findings herein will be entered.

TATE, *Commissioner*, concurring in part:

I concur in the report and the order of the majority in this case, except that portion which would compel the addition of the emergency surcharges within the State of Ohio in the event the carriers

apply the said surcharges on their interstate movements. Without lengthening this expression, I simply refer to the reasons given in my dissenting-in-part expression in *Increases in Intrastate Freight Rates*, 186 I.C.C. 615.

EASTMAN, *Commissioner*, dissenting:

I am not persuaded by the evidence that the Ohio intrastate rates in issue are below a maximum reasonable level or that the interstate rates in issue which are on a higher relative level, distance and other pertinent transportation conditions considered, ought not to be reduced. At the present time the coal industry, like the railroad industry, is in serious financial straits; and in both instances the effects of the general economic depression are aggravated by rapidly increasing competition from outside sources, from other transportation agencies in the case of the railroads, and from other heat or power producing agencies in the case of the coal mines. An outstanding difference is that reductions have been avoided to a much greater extent in the case of the freight rates on coal than in the case of the mine prices for coal. The dislocation thus created is under consideration in the general freight-rate investigation in no. 26000 and I agree that it ought not to enter in any controlling way into our consideration of the issues in this proceeding. However, I think that it may properly influence us to the extent, at least, of not resolving doubts against the reduced rates.

As I read the report of the majority, it resolves most doubts very definitely against the reduced rates. Let me illustrate this:

1. *Rate comparisons.*—It is clear that the reduced rates, measured by the rates which we ourselves have prescribed in Indiana-Illinois territory, are in general not below a maximum reasonable level. This measure, however, is rejected as unreliable, for two reasons, as I understand them: First, because of the highly competitive conditions which prevail in Indiana-Illinois territory and the alleged fact that we prescribed rates there "with primary regard for competition"; and second, because it is not shown that transportation conditions in Ohio and the adjacent portion of Pennsylvania are similar to those in the Indiana-Illinois territory.

I submit that we prescribed these rates in Indiana-Illinois territory in terms as maximum reasonable rates which could not be exceeded; that if we prescribed such rates with "primary regard for competition", we were derelict in our duty under the law; and that there is nothing in the reports in question which justifies the conclusion that we erred in this way. It is true that we found that the rates to Chicago were depressed, but it is not the rates to Chicago

which are here offered for comparative purposes but the rates which we prescribed, in many instances as reductions, for application to numerous smaller destinations throughout Indiana and Illinois where conditions bear little resemblance to those which exist at Chicago. Moreover, there is no valid basis for the conclusion that competitive conditions are less intense in Indiana-Illinois territory than in northeastern Ohio. The facts stated at length in the majority report itself are proof positive to the contrary.

Ohio, Indiana, and Illinois are all included in the territory west of the Alleghenies, north of the Ohio River, and east of the Mississippi River in which we have many times prescribed rates on a uniform level. As an illustration of our findings in this respect, *Jones & Laughlin Steel Corp.* v. *B. & O. R.R. Co.*, 96 I.C.C. 682, 691, may be cited, where we said: "As between Illinois and the territory east thereof, there are in general no differences in transportation conditions which would warrant material differences in rates." Here, elaborate evidence was submitted purporting to show that transportation conditions in the movement of coal are no less favorable in Indiana-Illinois territory than in northeastern Ohio. This evidence is dismissed from consideration by the majority, in part because of "twenty-one *alleged* categories of errors." There is, however, no proof that transportation conditions are more burdensome in Ohio. On the contrary, traffic executives of the Pennsylvania and the Baltimore & Ohio testified that a normal level of coal rates in Indiana and Illinois would be a fair measure for Ohio. The majority, however, go so far as to cast doubt on previous conclusions that rates should in general be on a uniform level in Illinois and territory east thereof, by mentioning rates which are lower in Illinois, and converting this fact into a "principle" said to be supported in certain cited cases, none of which, so far as I can determine, in fact supports any such "principle." A further example of this supposed "principle" is said to be sand and gravel rates, although all that we have done with respect to those rates, as I understand it, is to approve a so-called group and differential adjustment in Illinois, instead of the mileage adjustment which prevails in the remainder of central territory, but without intent to approve any lower average level in Illinois.

In discrediting rate comparisons which are favorable to the Ohio rates, the majority also dismiss the Holmes & Hallowell scale from consideration, although we have repeatedly used it as a convenient means of testing the relative level of coal rates, and include in this dismissal an exaggerated description of the favorable transportation

conditions in the territory where this scale is applied. They also see fit to cast doubt on certain ex-river coal rates which we have prescribed in this territory, although these cases have not been reopened and are not here before us.

In contrast with this treatment of rate comparisons which are favorable to the Ohio rates, the majority find no difficulty in accepting comparisons which are unfavorable and many of which are drawn from eastern districts where we have repeatedly found the transportation conditions surrounding the movement of coal to be more burdensome than in the central-territory districts west of the Alleghenies. In fact, citations of such cases in these eastern districts are followed by a statement that the record is replete with "comparisons of this nature" which indicate that the former rates in Ohio were not higher than rates "in the same general territory."

2. *The cost study.*—An elaborate cost study was submitted by the Wheeling to show that the reduced rates produce large earnings, not over out-of-pocket costs merely, but over a full allocation of operating expenses including the deficit incurred in passenger operations. In concluding that this study is not entitled to weight, the majority seem to me to accept at face value many of the criticisms of the opposing carriers without any careful analysis of the answers to these criticisms which were offered by the Wheeling. Nor is any attempt made to arrive at a corrected result after making allowance for criticisms found upon thorough analysis to be valid, although the margin of earnings shown by the Wheeling is ample enough to absorb substantial corrections without vitiating the conclusion that the reduced rates are profitable. It is significant, also, that no countervailing cost studies were submitted by the opposing carriers.

3. *Effect of preserving differentials.*—As a result of preserving preexisting rate differentials in connection with the general rate increases, the rates for the short hauls within Ohio have been increased by much larger percentages than the competitive rates for the longer hauls from the more remote districts. An illustration is the Middle Coshocton-Massillon rate to Cleveland, which for many years was the same as the rate from the Pittsburgh district to Youngstown. The former was increased from 70 cents to $1.54, or 120 percent, whereas the latter was increased from 70 cents to $1.34, or 91.4 percent. Both were increased a materially greater percentage than many of the long-haul rates. The majority now require the Cleveland rate to be restored to $1.54, and support this conclusion by stating that we approved the principle of preserving

differentials in *Increased Rates, 1920*, 58 I.C.C. 220, and that any other principle would "destroy the competitive relationships between mining groups." The following statement from *Lake Cargo Coal Rates, 1925*, 126 I.C.C. 309, 363, has apparently been forgotten:

> Our previous findings were also based in part upon the fact that the rates assailed resulted from those prescribed in 1912, with only the subsequent general increases and reductions, and the differentials are the same as those prescribed in 1917. It cannot be denied, however, that the increases have been proportionately greater in the rates from the complaining districts than in those from the southern districts, and in fact proportionately greater than in the class and commodity rates generally in the same territory. It is true that we approved the manner of increasing these rates, and we have held that such increases were not proof that the resulting rates were unreasonable, but this does not prevent us from according relief from rates so increased where the facts otherwise justify it, and we did accord relief from rates approved in 1917 and later modified only by the general increases and reduction in the *Ohio-Michigan Coal Cases*. The present record shows clearly that the circumstances and conditions now existing are materially different from those existing at the time of the decision in the *Boileau case* in 1912 and the *Lake Cargo Coal Case* of 1917.

Relief was accorded in the case of these lake-cargo rates by reducing the rates for the shorter hauls 20 cents per ton.

Summing up the matter, my judgment is that the majority have given altogether insufficient weight to the evidence which is favorable to the Ohio rates and have accorded too much weight to the opposing evidence. I cannot, therefore, accept the conclusions which have been reached. My impression, gained wholly from the report, is that the majority have been influenced, very naturally but I think unduly, by the alarming estimates of revenue reductions which it is feared will ultimately follow if these Ohio rates are not restored to their former levels. In my opinion it is by no means certain that all of these reductions would be necessary, but the more important consideration is that it is even less certain, in view of the conditions now surrounding the coal industry, that it is to the advantage of the carriers themselves to maintain all of their coal rates at the levels which have hitherto prevailed.

APPENDIX A

Docket No. 25566

	Number of active mines	Total average mileage	Average distance, short tariff route	Rate per net ton	
				Former	Present
		Miles	Miles	Cents	Cents
From Ohio No. 8 district to—					
Cleveland, Ohio	55	7,049.8	128.2	174	145
Lorain, Ohio	55	7,614.8	138.5	178	145
Huron, Ohio	55	8,721.2	158.6	174	155
Canton, Ohio	55	3,898.4	71.6	126	108
Massillon, Ohio	55	4,217.6	76.7	126	108
Akron, Ohio	55	5,308.6	96.5	151	126
Mansfield, Ohio	55	8,511.5	154.8	178	178
From Middle district to—					
Cleveland, Ohio	13	1,203.6	92.6	154	122
Lorain, Ohio	13	1,402.0	107.8	154	128
Huron, Ohio	13	1,597.9	122.9	164	134
Canton, Ohio	13	441.0	33.9	76	60
Massillon, Ohio	13	527.4	40.6	101	80
Akron, Ohio	13	747.6	57.5	126	101
Mansfield, Ohio	13	1,846.6	142.0	163	163
From Middle-Coshocton district to—					
Cleveland, Ohio	25	3,877.8	104.0	154	122
Lorain, Ohio	25	2,400.8	76.0	154	128
Huron, Ohio	25	3,730.6	149.2	164	134
Canton, Ohio	25	914.0	36.6	76	60
Massillon, Ohio	25	1,416.2	38.3	101	80
Akron, Ohio	25	2,909.0	75.9	126	101
Mansfield, Ohio	25	4,008.8	108.2	163	163
From Massillon district to—					
Cleveland, Ohio	1	75.4	75.4	154	108
Lorain, Ohio	1	74.0	74.0	154	108
Huron, Ohio	1	91.0	91.0	159	115
Canton, Ohio	1	18.0	18.0	101	72
Massillon, Ohio	1	11.0	11.0	64	60
Akron, Ohio	1	41.4	41.4	126	87
Mansfield, Ohio	1	71.0	71.0	153	153
From Cambridge district to—					
Cleveland, Ohio	12	2,112.7	176.1	174	145
Lorain, Ohio	12	2,018.9	168.2	174	145
Huron, Ohio	12	2,424.6	202.1	174	155
Canton, Ohio	12	1,197.3	99.8	126	126
Massillon, Ohio	12	1,510.7	125.9	126	126
Akron, Ohio	12	1,540.6	128.4	151	126
Mansfield, Ohio	12	1,443.3	120.3	176	151
From Crooksville district to—					
Cleveland, Ohio	17	2,905.3	170.9	176	147
Lorain, Ohio	17	3,569.8	210.0	176	147
Huron, Ohio	17	3,202.2	188.4	176	157
Canton, Ohio	17	2,056.9	128.8	126	122
Massillon, Ohio	17	1,941.3	121.3	126	108
Akron, Ohio	17	2,535.4	149.1	151	126
Mansfield, Ohio	17	1,732.0	101.9	151	151
From Hocking district to—					
Cleveland, Ohio	41	8,171.8	199.3	189	160
Lorain, Ohio	41	9,352.0	228.1	189	160
Huron, Ohio	41	10,389.7	253.4	189	170
Canton, Ohio	41	6,855.8	167.4	189	189
Massillon, Ohio	41	6,546.8	159.7	189	189
Akron, Ohio	41	7,430.9	181.0	189	160
Mansfield, Ohio	41	5,608.3	136.8	151	151
From Pomeroy district to—					
Cleveland, Ohio	9	2,272.2	252.5	189	160
Lorain, Ohio	9	2,508.7	278.7	189	189
Huron, Ohio	9	2,766.7	307.4	189	170
Canton, Ohio	9	2,368.8	263.0	189	189
Massillon, Ohio	5	1,267.2	253.6	189	189
Akron, Ohio	9	2,273.8	252.6	189	160
Mansfield, Ohio	9	1,728.7	192.1	189	189

I. and S. Dockets Nos. 3801 and 3833 and Docket No. 25590

	Number of active mines	Total average mileage	Average distance short tariff route	Rate per net ton
		Miles	*Miles*	*Cents*
From Pittsburgh district to—				
Cleveland, Ohio	144	23,330.6	[1] 162.0	[1] 184
Lorain, Ohio	144	24,420.3	169.6	[1] 184
Huron, Ohio	61	10,093.3	165.5	[2] 216
Canton, Ohio	143	18,534.4	129.6	[1] 159
Massillon, Ohio	143	18,515.9	129.5	[1] 159
Akron, Ohio	144	20,735.4	144.3	172
Mansfield, Ohio	151	30,402.8	201.3	203
From Freeport district to—				
Cleveland, Ohio	8	1,303.0	162.9	184
Lorain, Ohio	8	1,620.6	202.6	184
Huron, Ohio	8	1,833.4	229.2	216
Canton, Ohio				
Massillon, Ohio				
Akron, Ohio				
Mansfield, Ohio	8	1,100.8	137.6	172
From Connellsville district to—	8	1,734.4	216.8	203
Cleveland, Ohio	78	16,876.6	216.4	190
Lorain, Ohio	78	18,818.0	241.3	190
Huron, Ohio	60	16,400.0	273.3	222
Canton, Ohio	78	14,862.6	190.5	165
Massillon, Ohio	78	14,894.7	191.0	165
Akron, Ohio	78	15,296.6	196.1	178
Mansfield, Ohio	78	17,994.4	230.7	209

[1] Via P. & W. V. Ry. rate is $1.55.

[2] Via P. & W. V. Ry. rate is $1.65

Docket No. 25657

	Number of active mines	Total average mileage	Average distance short tariff route	Rate per net ton
		Miles	*Miles*	*Cents*
From Kanawha [1] district—				
Cleveland, Ohio	149	52,716.5	353.8	239
Lorain, Ohio	149	56,008.9	375.9	239
Huron, Ohio	149	60,304.4	404.7	239
Canton, Ohio	149	50,176.5	336.8	239
Massillon, Ohio	149	49,108.2	329.6	239
Akron, Ohio	149	52,073.1	349.5	239
Mansfield, Ohio	149	44,088.6	295.9	239
From Kenova [1] district to—				
Cleveland, Ohio	16	5449.0	340.6	239
Lorain, Ohio	16	5394.6	337.3	239
Huron, Ohio	16	5164.2	322.8	239
Canton, Ohio	16	5145.0	321.6	239
Massillon, Ohio	16	5113.0	319.6	239
Akron, Ohio	16	5353.0	334.6	239
Mansfield, Ohio	16	4418.6	276.2	239
From Thacker [1] district to—				
Cleveland, Ohio	42	15,291.0	364.1	239
Lorain, Ohio	42	15,148.2	360.7	239
Huron, Ohio	42	14,543.4	346.3	239
Canton, Ohio	42	14,493.0	345.1	239
Massillon, Ohio	42	14,409.0	343.1	239
Akron, Ohio	42	15,387.6	366.4	239
Mansfield, Ohio	42	12,586.2	299.7	239
From New River [2] district [3] to—				
Cleveland, Ohio	116	47,475.3	409.3	264
Lorain, Ohio	116	49,997.7	431.0	264
Huron, Ohio	116	53,231.8	458.9	264
Canton, Ohio	116	46,079.3	397.2	264
Massillon, Ohio	116	45,160.3	389.3	264
Akron, Ohio	116	47,012.4	405.3	264
Mansfield, Ohio	116	40,861.7	352.3	264

[1] High-volatile coal.
[2] Low-volatile coal.
[3] Chesapeake & Ohio Railway and New York Central Railroad.

Docket No. 25657—Continued

	Number of active mines	Total average mileage	Average distance short tariff route	Rate per net ton
From New River [3] and Pocahontas [3] district [4] to—				
Cleveland, Ohio	183	80,345.9	439.0	264
Lorain, Ohio	183	84,018.5	459.1	264
Huron, Ohio	183	85,852.3	469.1	264
Canton, Ohio	183	74,296.9	406.0	264
Massillon, Ohio	183	73,308.9	400.6	264
Akron, Ohio	183	81,164.5	443.5	264
Mansfield, Ohio	183	68,819.5	376.1	264
From Pocahontas [3] district [4] to—				
Cleveland, Ohio	62	26,959.0	434.8	264
Lorain, Ohio	62	26,748.2	431.4	264
Huron, Ohio	62	25,855.4	417.0	264
Canton, Ohio	62	25,781.0	415.8	264
Massillon, Ohio	62	25,657.0	413.8	264
Akron, Ohio	62	26,587.0	428.8	264
Mansfield, Ohio	62	22,966.2	370.4	264
From Tug River [3] district [4] to—				
Cleveland, Ohio	31	12,713.1	410.1	264
Lorain, Ohio	31	12,607.6	406.7	264
Huron, Ohio	31	12,161.2	392.3	264
Canton, Ohio	31	12,124.0	391.1	264
Massillon, Ohio	31	12,062.0	389.1	264
Akron, Ohio	31	12,527.0	404.1	264
Mansfield, Ohio	31	10,716.6	345.7	264

[3] Low-volatile coal.
[4] Virginian Railway.
[5] Norfolk & Western Railway.

Docket No. 25670

	Number of active mines	Total average mileage	Average distance short tariff route	Rate per net ton
		Miles	*Miles*	*Cents*
From Fairmont district to—				
Cleveland, Ohio	117	28,902.8	247.0	199
Lorain, Ohio	117	29,675.3	253.6	199
Huron, Ohio	117	32,242.7	275.6	216
Canton, Ohio	117	22,880.7	195.6	182
Massillon, Ohio	117	22,800.5	190.6	165
Akron, Ohio	117	25,733.4	219.9	182
Mansfield, Ohio	117	30,596.9	261.5	203

Docket No. 26656

	Average distance, short tariff route	Rate per net ton
	Miles	*Cents*
From Monongahela Ry. in West Virginia:		
Cleveland, Ohio	234.9	199
Lorain, Ohio	250.9	199
Canton, Ohio	204.4	184
Massillon, Ohio	187.9	187
Akron, Ohio	218.1	187
Mansfield, Ohio	258.5	213

APPENDIX B

Volume of bituminous coal in net tons of 2,000 pounds

To—	Year	From Ohio No. 8	From Middle	From Massillon	From Cambridge	From Pittsburgh	From Connellsville	From Fairmont	From Kanawha	From Kenova	From Thacker
Cleveland	1922	1,641,785	443,525		167,346	534,186	388,850	199,397			
	1923	2,252,325	526,143		143,047	1,056,566	538,285	150,856			
	1924	2,165,866	431,256		95,250	662,971	956,423	189,116			
	1925	2,269,077	510,760		73,067	871,690	585,004	310,582	556,857	26,094	20,985
	1926	2,166,683	306,843	12,004	75,243	1,076,885	540,514	365,424	843,226	17,633	24,078
	1927	1,204,882	134,312	6,252	53,210	862,877	993,562	824,340	761,850	24,662	46,219
	1928	861,526	86,445	4,301	12,078	1,406,262	1,164,850	1,111,512	389,600	49,520	40,220
	1929	1,007,993	197,590	5,530	65,069	1,417,890	1,009,789	1,297,366	292,780	13,654	12,529
	1930	908,802	258,030	5,129	74,207	1,492,471	567,049	1,192,105	217,700	4,377	14,848
	1931	792,483	310,501	4,208	77,442	1,260,895	410,408	841,925	137,691	3,288	17,054
	1932	273,795	172,171		29,082	589,370	176,077	328,261	33,542	695	13,285
Lorain and South Lorain	1922	306,767	32,766		2,631	315,731	412,985	10,429			
	1923	452,010	31,776		18,402	416,324	984,888	44,656			
	1924	441,128	34,514		5,662	341,526	734,902	5,019			
	1925	547,060	29,138		2,381	234,108	895,452	2,072	116,053	4,540	23,980
	1926	433,276	14,498	49	2,762	247,927	1,187,024	9,521	94,821	3,207	18,940
	1927	269,362	8,160	112	2,079	228,137	930,250	46,388	84,811	4,050	19,021
	1928	199,267	7,830	250	1,120	447,355	1,095,461	18,847	81,786	2,830	12,933
	1929	94,270	13,273	130	2,392	331,485	1,381,229	14,570	33,268	2,198	10,766
	1930	60,440	13,556	50	2,632	342,769	934,230	8,946	62,242	1,961	9,434
	1931	13,630	6,550		1,700	312,173	546,310	11,202	21,589	815	6,166
	1932	6,198	4,941		1,037	98,580	128,255	11,626	4,192	580	1,247
Akron	1922	608,828	355,947		200,500	285,716	109,151	61,582			
	1923	871,499	445,806		273,849	398,879	29,425	75,208			
	1924	913,459	272,217		219,339	363,680	41,321	57,267			
	1925	871,757	370,956		175,242				188,342	36,544	18,049
	1926	972,482	379,757	3,556	91,301	513,536	50,191	138,602	201,421	19,594	26,254
	1927	534,728	309,712	1,638	57,420	397,423	140,689	611,904	259,009	35,076	29,016
	1928	703,666	224,516	273	36,793	547,900	92,386	447,271	273,369	31,494	27,129
	1929	927,063	194,449	3,437	162,119	566,334	18,811	331,681	251,668	25,173	33,120
	1930	906,285	171,133	523	167,953	446,908	2,986	208,906	192,735	15,862	43,256
	1931	896,474	257,421		119,781	217,886	873	195,698	121,504	4,901	19,041
	1932	389,176	127,908		31,978	71,939	7,537	103,791	41,670	1,079	2,986
Canton	1922	165,428	141,554		9,666	100,163	75,490	5,432			
	1923	271,270	140,536		6,464	141,121	50,931	4,766			
	1924	319,479	108,871		4,700	94,037	152,208	5,001			
	1925	443,847	127,988		1,902	93,379	202,064	3,259	16,219	903	91,255
	1926	462,517	82,163	568	1,708	98,292	163,784	51,727	37,542	1,051	116,398
	1927	273,264	97,672	153	879	121,644	143,231	70,373	54,691	3,114	127,742
	1928	266,922	94,988	143	666	135,032	144,526	72,262	70,809	2,827	75,663
	1929	198,043	140,408	571	22,521	148,580	262,229	54,598	72,013	5,256	85,072
	1930	206,281	85,419	334	86,919	87,606	183,078	35,122	50,097	2,478	45,329

Massillon	1931	204,573	113,122	555	45,840	39,961	169,556	9,171	31,752	1,311	2,266
	1932	66,834	47,269		8,790	12,036	36,914	2,546	13,247	297	49
	1922	27,969	117,021		632						
	1923	39,041	133,366		3,605						
	1924	40,352	122,359		11,922						
	1925	49,259	173,516		10,823						
	1926	47,402	182,173	19,027	6,785	3,053	160	1,322	14,471	256	
	1927	12,473	124,371	14,515	311	4,649	261,980	45,746	762		
	1928	15,180	113,314	7,522	88	5,076	334,457	1,720	580	101	67,266
	1929	20,190	119,347	6,067		6,112	263,585	881	660	60	29,123
	1930	49,567	96,076	5,072	6,043	1,541	126,422	227	239		175
	1931	100,507	79,731	4,128	3,866	1,340	100,096	370	121		
	1932	28,185	33,806		1,563	967	49,015	3,191			
Mansfield	1922	50,666	7,259		8,006						
	1923	55,563	6,915		26,637						
	1924	23,106	959		22,517						
	1925	59,789	1,819		25,507						
	1926	60,179	256		22,071	837		4,463			
	1927	21,668	433		19,597	9,788	913	25,202			
	1928	26,507	1,250		17,363	23,230		28,279			
	1929	86,497	415		26,646	11,727	720	9,891			
	1930	61,991	578		23,560	8,206	859	13,277			
	1931	32,424	455		16,010	3,137	23	13,939			
	1932										

1 January to June, inclusive.

APPENDIX C

Statement showing gross revenue from rate, absorbed switching charges, operating revenue after switching absorptions, estimated transportation cost (operation expenses and passenger deficit) and net operating revenue, per ton, on bituminous coal transported from Ohio No. 8 Coal district to Cleveland, South Lorain, Huron, Canton, Massillon, and Akron, Ohio

	To Cleveland	To South Lorain	To Huron	To Canton	To Massillon	To Akron
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
1. Gross revenue from rate per ton	145.0	145.0	155.0	108.0	108.0	128.0
2. Absorbed switching charges	16.0	22.1	----------	00.6	----------	00.7
3. Operating revenue (after switching absorptions)	129.0	122.9	155.0	107.4	108.0	127.3
4. Estimated transportation cost (operating expenses and passenger deficit)	80.2	75.8	79.1	63.9	65.2	78.5
5. Net operating revenue	48.8	47.1	75.9	43.5	42.8	48.8
6. Percent of net operating revenue of gross revenue from rate	(33.66)	(32.48)	(48.97)	(40.28)	(39.63)	(38.13)
7. Operating ratio (relationship item 4 to item 3)	(62.17)	(61.68)	(51.03)	(59.50)	(60.37)	(61.67)

APPENDIX D

Rates to remove undue preference against localities and interstate shippers of bituminous coal from the rate districts of Pittsburgh, Freeport, and Connellsville, in Pennsylvania, and Fairmont in West Virginia, and undue preference of localities and shippers of bituminous coal from eastern Ohio districts to northeastern Ohio territory, which districts and territory are herein described, and to remove unjust discrimination against interstate commerce:

From:

Eastern Ohio districts:

Ohio No. 8; Middle; Massillon; Cambridge; Crooksville; Hocking; and Pomeroy.

To:

Destinations in northeastern Ohio, east of a line drawn through Sandusky, Galion and Columbus and north of an east-and-west line drawn through Columbus, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points.

Rates not less than those applicable from and to the points or groups named, and in effect immediately prior to August 1, 1932.

192 I.C.C.

U. S. GOVERNMENT PRINTING OFFICE: 1933

ORDERS.

At a General Session of THE INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of May, A. D. 1933.

No. 25566.

INTRASTATE RATES ON BITUMINOUS COAL WITHIN THE STATE OF OHIO.

It appearing, That by order of October 3, 1932, supplemental order of October 28, 1932, and second supplemental order of December 7, 1932, the commission, upon its own motion, entered upon an investigation concerning the lawfulness of the rates, charges, rules, regulations, and practices governing the transportation of bituminous coal, in carloads, between certain points within the State of Ohio as named in petitions filed on behalf of certain common carriers by railroad operating in the State of Ohio, which said carriers as well as all common carriers by railroad operating in the State of Ohio, were herein made respondents.

It further appearing, That full investigation of the matters and things involved has been had, and that the commission has on the date hereof, made and filed its report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That said respondents according as they participate in the transportation be, and they are hereby, notified and required to cease and desist upon (from) practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination

against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia to destinations in Ohio, on the one hand, and the intrastate rates on like traffic between points in Ohio as indicated in the said report, on the other, and to establish, on or before June 10, 1933, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the intrastate transportation of bituminous coal, in carloads, from and to the said points in Ohio rates which shall not be less than the rates or bases of rates prescribed as minima in the said report and set forth in Appendix D thereto; provided, that to the specific rates, or the rates resulting from the bases of rates, found in the said report to be minima for intrastate application as aforesaid, should be added the emergency rates or charges authorized in the *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 179 I. C. C. 215; 191 I. C. C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations.

And it is further ordered, That this order shall continue in force until the further order of the commission.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed July 7, 1933. H. F. Rabe, Clerk.

ORDER.

This cause came on for hearing on the application and notice of plaintiffs for an interlocutory injunction and was argued by counsel and submitted to the court; and thereupon the parties in open court stipulated and agreed to submit the cause for final hearing; thereupon the cause came on for final hearing and for a permanent injunction upon the pleadings and evidence and was argued by counsel and the court fixed Saturday, June 24, 1933, for the filing of briefs by all parties and final submission of the cause; thereafter the Interstate Commerce Commission, upon its own motion, at the request of this Court stayed the effective

date of its two orders herein complained of until July 10, 1933, but it appearing now that a final decision cannot be rendered by this Court as of that date and this Court being of the opinion that pending final determination of this suit, plaintiffs are entitled to the preliminary relief prayed for,

It is ordered, adjudged and decreed that the order of the Interstate Commerce Commission of May 2, 1933, in No. 25566, Intrastate Rates on Bituminous Coal in the State of Ohio, and the order of May 9, 1933, in No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and the operation of said orders, be and the same hereby are restrained and suspended until the further order of this Court.

_____,
Judge, Cir. Ct. of App.
ROBERT R. NEVIN,
District Judge.
BENSON W. HOUGH,
District Judge.

July 7, 1933.

A true copy of the original filed July 7, 1933.

Attest:
HARRY F. RABE,
Clerk.
By W. ROHMITT, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed July 7, 1933. H. F. Rabe, Clerk.

ORDER.

This cause came on for hearing on the application and notice of plaintiffs for an interlocutory injunction and was argued by counsel and submitted to the court; and thereupon the parties in open court stipulated and agreed to submit the cause for final hearing; thereupon the cause came on for final hearing and for a permanent injunction upon the pleadings and evidence and was argued by counsel and the court fixed Saturday, June 24, 1933, for the filing of briefs by all parties and final submission of the cause; thereafter the Interstate Commerce Commission, upon its

own motion, at the request of this Court stayed the effective date of its two orders herein complained of until July 10, 1933, but it appearing now that a final decision cannot be rendered by this Court as of that date and this Court being of the opinion that pending final determination of this suit, plaintiffs are entitled to the preliminary relief prayed for,

It is ordered, adjudged and decreed that the order of the Interstate Commerce Commission of May 2, 1933, in No. 25566, Intrastate Rates on Bituminous Coal in the State of Ohio, and the order of May 9, 1933, in No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and the operation of said orders, be and the same hereby are restrained and suspended until the further order of this Court.

_____,
Judge, Cir. Ct. of App.
ROBERT R. NEVIN,
District Judge.
BENSON W. HOUGH,
District Judge.

July 7, 1933.

A true copy of the original filed July 7, 1933.

Attest:
HARRY F. RABE,
Clerk.
By W. ROHMITT, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 6, 1934. H. F. Rabe, Clerk.

Before HICKENLOOPER, Circuit Judge, and HOUGH and NEVIN, District Judges.

Per Curiam:

Each of the present suits is brought to enjoin two orders of the Interstate Commerce Commission, and is, of course,

filed under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. A. §§ 41 (28)—48. The first of these orders, (1) issued May 2, 1933, under Section 13 of the Interstate Commerce Act as amended February 28, 1920 (c. 91, § 416, 41 Stat. 484), required the increase of Ohio intrastate rates on bituminous coal from certain mining districts in eastern and southern Ohio to points of destination in northeastern Ohio. The second order, issued May 9, 1933, required the increase in all Ohio intrastate rates on bituminous coal in the amount of the increase (known as the surcharge) authorized in interstate rates on bituminous coal by the *Fifteen Per Cent Case*, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361. The authorization of this surcharge expired, according to its terms, on September 30, 1933, and was not then renewed, and the surcharge has therefore been discontinued since that date. The validity of this second order has, we think, been conclusively established by the decisions of the United States Supreme Court since the present case was submitted, that is, the decisions on November 6, 1933, in *United States, et al.* v. *Louisiana, et al.*, 240 U. S. —, and *State of Montana* v. *United States, et al.*, 290 U. S. —. See also, *Kentucky* v. *United States*, 3 F. Supp. 778. Both because of this fact, and because of the discontinuance of the surcharge, we may limit our discussion and consideration here to the question of the validity of the first order above stated.

Through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all

---

(1) 192 I. C. C. 413.

the elements which must be considered in rate making. This rate structure with which we are here concerned was last considered by the Interstate Commerce Commission (prior to the investigations here involved) in *Ohio-Michigan Coal Cases,* 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton. This threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage.

The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed rates "result and will result in undue, unreasonable, and unjust discrimination against interstate commerce in violation of Section 13 of the Act," in that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question caused unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates caused undue and unreasonable discrimination against interstate commerce, as such. Both types of discrimination are forbidden by Section 13.

In a case of this sort we are, of course, concerned only with the sufficiency of the evidence to support the fact finding of the Commission and the sufficiency of the facts found to support the conclusion of the order entered. While the Commission must act upon evidence and not arbitrarily, and must properly apply the law, the courts are not concerned with "the soundness of the reasoning by which its conclusions are reached, or whether the findings are consistent with those made by it in other cases." Nor are we concerned with the "wisdom" of the regulation which is prescribed. These are matters left by Congress exclusively to the administrative branch of the Government. Among the great number of decisions to this effect, see: *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441-6; *Baltimore & O. R. Co.* v. *Pitcairn*, 215 U. S. 418; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Virginian R.* v. *United States*, 272 U. S. 658, 665-6; *Georgia Commission* v. *United States*, 283 U. S. 765, 775.

Viewed in this light, there is no question, we think, that the order of the Interstate Commerce Commission must stand. It may possibly be that the evidence before, and the subordinate fact-findings of, the Commission are insufficient to sustain the ultimate conclusion of discrimination against interstate commerce as a whole. *Florida* v. *United States*, 282 U. S. 194. It is true that there are findings here of the loss to interstate carriers if there were to be a continuance of the diversion of traffic from interstate carriers to Ohio intrastate carriers, which diversion had already occurred to a large degree, and findings of the loss of income to interstate carriers if the reductions made in Ohio intrastate rates were also to be reflected in or applied to

interstate rates, and this may be enough even under the case just cited. Cf. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. It is also true that we have here what we did not have in the Florida case—substantial evidence to support the charge of unreasonable preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand—and that this discrimination as between persons and localities is in itself a discrimination against the persons and localities carrying on that commerce; yet, in view of the holding of the Florida case, that where the Commission undertakes to sustain an order as to intrastate rates on the ground that they impose an undue burden upon the revenues of the carrier, "it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion," it is possible that the findings in the present case are not full enough or specific enough.

The Florida case also seems to imply that the "discrimination against interstate commerce" mentioned in Section 13 is to be limited solely to that discrimination which imposes an undue burden upon the revenues of the interstate carrier by requiring intrastate service at less than cost, or at well below the interstate level of compensation. We doubt whether these words should be thus limited in their meaning; and while there may be even greater doubt as to the application of this doctrine, even when so limited, to a case where the loss of revenue is to carriers other than those rendering the intrastate service, on the whole we prefer to place our decision on the single ground of the existence, or non-existence, under the intrastate rates, of preference

and prejudice as between persons and localities. We do not believe that it is necessary to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*; 284 U. S. 125, 131; *Florida* v. *United States*, *supra*, p. 210.

Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding. It is urged that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons and localities, and unduly prejudicial to persons and localities in other states. We cannot concur. A question of where lies the burden of proof can be of serious moment only when the evidence is in a state of equipoise. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for, as we have said, this was practically the only conclusion at which the Commission could have arrived.

The Commission also found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmount districts to destinations in northeastern Ohio were reasonable. It is contended that the order is void because the Commission did not also examine into and make findings upon all other rates from the Inner and Outer Crescents to northeastern Ohio. This contention is likewise without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmount districts, and the coal operators of these districts, be found.

There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. *United States* v. *Louisiana, supra* (decided Nov. 6, 1933). If it be contended that any rate from some other locality is unreasonable, and it is desired in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission.

It is also contended that under evidence introduced or tendered by the plaintiffs, involving a comparison with the rates and operating conditions in the Indiana and Illinois coal mining districts, the Ohio intrastate rates were shown to be *maximum* reasonable rates, and the Commission was without power to raise such rates above that reasonable maximum. But the Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable. *State Corporation Commission of Virginia* v. *Aberdeen & Rockfish R. Co.*, 136 I. C. C. 173, 180. But apart from this, "proceedings to remove unjust discrimination are aimed directly only at the *relation of rates.*" "If the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates." *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. To ask the court to review the decision of the Commission as to whether the disparity should be removed by lowering the interstate rate, or by raising the intrastate rate, or by both, or as to whether, in view of the evidence in regard to the Indiana-Illinois coal rates and operating conditions, the Ohio rates must be regarded as reasonable maximum rates, is asking

the court to substitute its judgment for that of the Commission, and to pass upon the soundness of the reasoning of the Commission, the wisdom of its conclusion and the consistency of the present order with those made in other cases. All of these decisions involve the exercise of powers which, under the authorities already cited, the court does not possess.

Lastly, it is urged, but with less vigor, that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced. Compare, *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 636. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, were referred to in the case of *United States* v. *Louisiana, supra*, decided November 6, 1933, as among the purposes of Congress in passing the Transportation Act of 1920. This, we think, is as it should be. Very broad powers have been given the Commission, under section 15-a of the Interstate Commerce Act, to fix rates so that the carriers "as a whole" may earn "an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property." It has been said to be impossible "to escape the dovetail relation" between sections 13 (4) and 15-a (*Wisconsin R. R. Commission* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563, 586; *Florida* v. *United States, supra*, at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. But whether this position be sound or not,

we are quite firmly convinced that competition cannot be urged as a justification for the practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination.

For the reasons above stated the bills in the present case will be dismissed. An order may first be drawn granting the petitions to intervene upon which the court has not yet acted, and then another order dismissing the bills. Decree may be prepared and filed Saturday, Jany. 13th, 1934.

NOTE: The above *per curiam* opinion was prepared by Judge Smith Hickenlooper a short time prior to his death, pursuant to an arrangement had at a conference of the three judge court at Cincinnati on December 2nd, 1933.

Judge Hickenlooper's death ensued, and the opinion was found among his files of the cases involved. It is now published as the opinion of the Court, the Hon. Robert R. Nevin and the undersigned having entered our concurrence on a copy thereof, filed in the United States District Court (Chambers), Columbus, Ohio.

BENSON W. HOUGH,
United States District Judge,
Southern District of Ohio.

Dated: Columbus, Ohio, January 6th, 1934.

A true copy of the Original. Filed Jany. 6, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO, PETITIONERS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

FINAL DECREE VACATING AND SETTING ASIDE TEMPORARY INJUNCTION AND DISMISSING THE PETITION.

This cause came on to be heard on final hearing, the District Judge having upon the filing of the petition called to his assistance a Circuit Judge and another District Judge as required by the Act of October 22, 1913 (c. 32, 38 Stat. 208, 220, U. S. C., Title 28, sec. 47), and the Court, so constituted as a statutory court of three judges, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined that the temporary injunction heretofore issued in this cause on July 7, 1933, should be vacated and set

aside, and that the petition should be dismissed for want of equity, at the cost of petitioners, it is

Ordered, adjudged, and decreed as follows:

(1) That the temporary injunction heretofore issued in this cause on July 7, 1933, restraining and suspending the operation of the orders of the Interstate Commerce Commission complained of in the above-entitled cause until the further order of the Court be, and the same is hereby, vacated and set aside.

(2) That the petition be, and the same is hereby, dismissed for want of equity, at the cost of petitioners.

This 19 day of January, 1934.

BENSON W. HOUGH,
United States District Judge.
ROBERT R. NEVIN,
United States District Judge.

A true copy of the Original. Filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

FINAL DECREE VACATING AND SETTING ASIDE TEMPORARY INJUNCTION AND DISMISSING THE PETITION.

This cause came on to be heard on final hearing, the District Judge having upon the filing of the petition called to his assistance a Circuit Judge and another District Judge as required by the Act of October 22, 1913, (c. 32, Stat. 208, 220, U. S. C., Title 28, Sec. 47) and the Court, so constituted as a statutory court of three judges, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined that the temporary injunction heretofore issued in

this cause on July 7, 1933, should be vacated and set aside, and that the petition should be dismissed for want of equity, at the cost of petitioners, it is

Ordered, Adjudged, and Decreed as follows:

(1) That the temporary injunction heretofore issued in this cause on July 7, 1933, restraining and suspending the operation of the orders of the Interstate Commerce Commission complained of in the above-entitled cause until the further order of the Court be, and the same is hereby, vacated and set aside.

(2) That the petition be, and the same is hereby, dismissed for want of equity, at the cost of petitioners.

This 19th day of January, 1934.

BENSON W. HOUGH,
U. S. District Judge.
ROBERT R. NEVIN,
U. S. District Judge.

A true copy of the original. Filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk.
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 22, 1934. H. F. Rabe, Clerk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

1. Through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Penn-

sylvania, northern West Virginia and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making. This rate structure was considered by the Interstate Commerce Commission in *Ohio-Michigan Coal Cases*, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton. This threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage.

2. Following the reductions by the Ohio Public Utilities Commission on August 1, 1932, 12 railroad common carriers, all engaged in interstate commerce and all except four also engaged in intrastate commerce within the State of Ohio, filed petitions with the Interstate Commerce Commission alleging in substance that the reductions in the Ohio intrastate rates brought about violations of section 13(3) and (4) of the Interstate Commerce Act and praying that the Commission institute an investigation to determine whether there were violations of these provisions of section 13.

3. The Interstate Commerce Commission thereupon instituted an investigation to determine whether the then-existing intrastate rates on bituminous coal, in carloads, from certain mining districts in eastern and southern Ohio, namely, Ohio No. 8, Middle, Massillon, Cambridge, Crooks-

ville, Hocking, and Pomeroy districts, to destinations in northeastern Ohio, that is, east of a line drawn through Sandusky and Galion to Columbus and north of a line drawn due east from Columbus to the Ohio-Pennsylvania state line, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and intermediate points, would cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by said railroads between such origins and destinations for such transportation in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist. All railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding. This proceeding was designated Docket No. 25566, *Intrastate Rates on Bituminous Coal within State of Ohio.*

4. Shortly after the institution of said investigation four formal complaints relating to the same subject matter were filed with the Commission, namely, No. 25590, *Western Pennsylvania Coal Traffic Bureau et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.*; No. 25656, *H. W. Showalter, Receiver, Continental Coal Co. et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.*; No. 25657, *Property Owners' Committee at al.* v. *Akron, Canton & Youngstown Ry. Co. et al.*; and No. 25670, *Receivers of Consolidation Coal Co. et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.* These formal complaints alleged, among other things, that the relation between the aforesaid Ohio intrastate

rates on bituminous coal, on the one hand, and the interstate rates on bituminous coal from various mining districts in Pennsylvania, West Virginia, Virginia and Kentucky to the same Ohio destinations, on the other hand, resulted in undue preference of persons and localities in Ohio and undue prejudice against complainants, in violation of sections 3 and 13 of the Interstate Commerce Act. These formal complaint cases were consolidated for hearing with No. 25566 and were heard jointly with that case, and there were also heard and considered with the above-mentioned cases two investigation and suspension cases, namely, Investigation and Suspension Dockets Nos. 3801 and 3833, both entitled *Coal from Pennsylvania to Northern Ohio.*

5. All of the aforesaid cases were decided by the Commission together in and by report and order dated May 2, 1933, *Intrastate Rates on Bituminous Coal within Ohio*, 192 I. C. C. 413.

6. The Interstate Commerce Commission, upon petition of the Public Service Commission of the Commonwealth of Pennsylvania, instituted an investigation to determine whether, through refusal of the Public Utilities Commission of Ohio to permit increases (called surcharges) in freight rates on bituminous coal on and after April 1, 1933, for intrastate traffic within the State of Ohio corresponding to those which were approved by the Interstate Commerce Commission for interstate traffic in *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, such intrastate rates caused or would cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce, on the other hand, or any unjust discrimination against interstate or foreign

commerce, and also to determine what rates and charges, if any, or what maximum or minimum, or maximum and minimum, should be prescribed to be charged by the carriers, in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist. All railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding which was designated Docket No. 25885. Said case was decided by the Commission and by report and order dated May 9, 1933, *Surcharges on Bituminous Coal within the State of Ohio*, 192 I. C. C. 734.

7. In No. 25566, *Intrastate Rates on Bituminous Coal within Ohio*, which was consolidated with the aforesaid four formal complaint cases, the Commission granted a full hearing, according to all parties to the consolidated proceeding, including the Public Utilities Commission of Ohio and various Ohio shipping interests, full and fair opportunity to be heard upon all matters involved in the proceeding. At the hearing held in said consolidated proceeding a large volume of testimony and other evidence bearing upon the matters involved was submitted to the Commission for consideration on behalf of the parties.

8. The aforesaid report and order of May 2, 1933, in No. 25566, includes the Commission's findings of fact, conclusions, orders and requirements in the premises.

9. In No. 25885, *Bituminous Coal within the State of Ohio*, the Commission granted a full hearing, according to all parties, including the Public Utilities Commission of Ohio and various Ohio shipping interests, full and fair opportunity to be heard upon all matters involved in the proceeding. At the hearing held in said proceeding a large volume of testimony and other evidence bearing upon the

matters involved was submitted to the Commission for consideration on behalf of the parties.

10. The aforesaid report and order of May 9, 1933, in No. 25885, includes the Commission's findings of fact, conclusions, orders and requirements in the premises.

11. Each of the present suits is brought to enjoin the two orders of the Interstate Commerce Commission, namely, the order of May 2, 1933, in No. 25566, and the order of May 9, 1933, in No. 25885.

12. The order of May 2, 1933, issued under section 13 of the Interstate Commerce Act as amended by Transportation Act, 1920 (c. 91, sec. 416, 41 Stat. 484), required that the Ohio intrastate rates on bituminous coal from the said mining districts in eastern and southern Ohio to northeastern Ohio be increased so that they would not be lower than the rates in effect immediately prior to August 1, 1932, this latter date being the first date of which reduced intrastate rates prescribed by the Ohio Commission became effective.

13. The order of May 9, 1933, also issued under section 13 of the Interstate Commerce Act, required the increase in all Ohio intrastate rates on bituminous coal in the amount of the increase (known as the surcharge) authorized in interstate rates on bituminous coal by the *Fifteen Per Cent Case*, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361. The authorization of this surcharge expired, according to its terms, on September 30, 1933, and was not then renewed, and the surcharge has therefore been discontinued since that date.

14. The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed Ohio

intrastate rates "result and will result in undue, unreasonable and unjust discrimination against interstate commerce in violation of section 13 of the Act," in that the "Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question cause unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates cause undue and unreasonable discrimination against interstate commerce, as such.

15. We find, upon the present record, that it is beyond dispute that there is substantial evidence to support the Commission's finding, if indeed, there is not a demonstration of the correctness of its finding, of unjust discrimination against persons and localities engaged in interstate commerce.

Conclusions of Law.

1. The validity of the order of May 9, 1933, *Surcharges on Bituminous Coal Within Ohio,* has been conclusively established by the decisions of the United States Supreme Court since the present case was submitted, that is, the decisions of November 6, 1933, in *United States et al.* v. *Louisiana et al.,* 290 U. S. —, and *State of Montana* v. *United States et al.,* 290 U. S. —.

2. The right of the Interstate Commerce Commission to remove undue preference and prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, if

any exists, is no longer open to dispute. *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131; *Florida* v. *United States*, 282 U. S. 194, 210.

3. The contention that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons and localities and unduly prejudicial to persons and localities in other states, is without merit. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for this was practically the only conclusion at which the Commission could have arrived.

4. The Commission having found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable, it was unnecessary that the Commission examine into and make findings upon all other rates from the inner and outer crescents to northeastern Ohio. The contention that the Commission's order is void for this reason is without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. *United States* v. *Louisiana*, 290 U. S. —, decided November 6, 1933. If it be contended that any rate from some other localities is unreasonable, and it is decided in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission.

5. The Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable. *State Corporation Commission of Virginia* v. *Aberdeen & Rockfish R. Co.*, 136 I. C. C. 173, 180. But apart from this, "proceedings to remove unjust discrimination are aimed directly only at the *relation of rates.*" "If the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates." *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. To ask the court to review the decision of the Commission as to whether the disparity should be removed by lowering the interstate rate, or by raising the intrastate rate, or by both, or as to whether, in view of the evidence in regard to the Indiana-Illinois coal rates and operating conditions, the Ohio rates must be regarded as reasonable maximum rates, is asking the court to substitute its judgment for that of the Commission, and to pass upon the soundness of the reasoning of the Commission, the wisdom of its conclusion and the consistency of the present order with those made in other cases. All of these decisions involve the exercise of powers which, under the authorities already cited, the court does not possess.

6. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, are among the purposes of Congress in passing the Transportation Act of 1920. *United States* v. *Louisiana, supra.* This, we think, is as it should be. Hence the contention that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier

increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced, must be overruled. Very broad powers have been given the Commission, under section 15a of the Interstate Commerce Act, to fix rates so that the carriers "as a whole" may earn "an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property." It has been said to be impossible "to escape the dovetail relation" between sections 13(4) and 15a (*Wisconsin R. R. Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 586; *Florida* v. *United States, supra,* at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. But whether this position be sound or not, we are quite firmly convinced that competition cannot be urged as a justification for the practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination.

7. The Commission's order is valid.

BENSON W. HOUGH,
United States District Judge.
ROBERT R. NEVIN,
United States District Judge.

A true copy of the original. Filed Jan. 22, 1934.

Attest:
HARRY F. RABE,
Clerk.
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Equity No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 13, 1934. H. F. Rabe, Clerk

APPLICATION BY PLAINTIFFS AND INTERVENING PLAINTIFFS FOR STAY PENDING APPEAL.

To; The Honorable Benson W. Hough and Robert R. Nevin, Judges of said Court:

Now come the State of Ohio and Public Utilities Commission of Ohio, plaintiffs herein, and Eastern Ohio Coal Operator's Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal & Dock Company; Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company,

Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire & Rubber Company, Firestone Tire & Rubber Company, B. T. Goodrich Company, Republic Steel Corporation and Otis Steel Company, intervening plaintiffs herein, and before the entry of a final decree herein, in accordance with the opinion of the court heretofore filed, represent to the Court:

(1) That it is the intention of said plaintiffs and intervening plaintiffs to perfect and prosecute, with all possible expedition, their appeal to the Supreme Court of the United States from so much of the decree to be entered herein as relates to the order of the defendant, The Interstate Commerce Commission, in its Docket No. 25566 entered May 2nd, 1933, modified June 8, 1933.

(2) That if said order of said defendant is permitted to take effect irreparable loss and damage will ensue not only to these plaintiffs and intervening plaintiffs, but to all persons engaged in, or dependent upon the business of mining coal in the State of Ohio and shipping said coal by railroad to destinations in northeastern Ohio, and to all consumers of such coal in the portion of the State of Ohio affected by said order, as well as persons in said portions of said state using coal produced in other states, as fully appears from the evidence submitted at the trial of this cause and from the affidavits of William [illegible]mery, Jr., and J. L. Ireland, Jr., attached hereto, made a part hereof and filed herewith.

Wherefore, plaintiffs and intervening plaintiffs pray that upon the entering of the final decree in accordance with the said opinion and pending the determination of said appeal said order of said defendant, Interstate Commerce Com-

mission, be stayed and its operation and enforcement suspended and restrained.

(Signed) JOHN W. BRICKER,
Attorney General of Ohio.
(Signed) E. S. BALLARD,
Solicitor for Intervening Plaintiffs Above Named.
(Signed) DONALD C. POWER,
Attorney for The Public Utilities Commission of Ohio.

STATE OF OHIO,
Franklin County, ss:

E. J. Hopple, being first duly sworn, deposes and says he is Chairman of The Public Utilities Commission of Ohio; that he has read the foregoing application and that the allegations thereof are true as he verily believes.

(Signed) E. J. HOPPLE.

Sworn to and subscribed in my presence this 12th day of January, A. D. 1934.

(Signed) C. M. CARMICHAEL,
[SEAL.] *Notary Public.*

My commission expires Mar. 3rd, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Equity No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Equity No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

AFFIDAVIT OF WILLIAM EMERY, JR.

STATE OF OHIO,
Cuyahoga County, ss:

William Emery, Jr., being duly sworn according to law, deposes and says that he is President of Cambridge Collieries Company, a corporation, one of the intervening plaintiffs herein, which is engaged in producing bituminous coal

5y

in the Ohio No. 8 and Cambridge districts in eastern Ohio, and selling said coal to dealers and consumers in northeastern Ohio in competition with bituminous coal produced in the mining districts of western Pennsylvania and northern West Virginia;

That he is vice-president of Eastern Ohio Coal Operators Association, a voluntary association, one of the intervening plaintiffs herein, composed of most of the producers of bituminous coal in the said Ohio No. 8 district;

That he is Chairman of the Ohio Subdivision of Division No. 1 of the Coal Code Authority established pursuant to the Code of Fair Competition of the bituminous coal industry and approved by the President of the United States under the National Recovery Act and that he is also Secretary of said Division No. 1 of said Coal Code Authority; that he has been interested in and connected with the coal mining business for nineteen years;

That he is familiar with the prices and the basis for prices of bituminous coal sold to dealers and consumers at destinations in northeastern Ohio affected by the order of the Interstate Commerce Commission of May 2nd, 1933 (as modified) in its Docket No. 25566 here in issue.

That, with the exception of a small amount of coal sold to consumers under special contracts at said destinations, all of the coal sold at said destinations is sold at f. o. b. mine prices; that if the rates fixed by said order of the Interstate Commerce Commission in its Docket No. 25566 become effective the cost to consumers at said destinations of approximately 98% of the coal mined in the Ohio fields will be increased by the difference between the rates now prevailing and the rates fixed by said order;

The f. o. b. mine prices of coal produced in western Pennsylvania and northern West Virginia for shipment to said destinations in northeastern Ohio have been reduced by

varying amounts below the prices of coal produced there for shipment to other destinations because of the present reduced Ohio intrastate coal rates; that if said reductions are discontinued following the taking effect of the Ohio intrastate rates prescribed by said order of the Interstate Commerce Commission, the cost to the consumer at said destinations of such coal will be increased by the amount of said reductions;

That the greater part of the coal consumed at said destinations for steam and domestic purposes originates in western Pennsylvania, northern West Virginia and the State of Ohio and the coal so produced sells and will sell in said destinations for lower prices than other coal used in said destinations for steam and domestic purposes.

(Signed) WM. EMERY, JR.

Sworn to before me and subscribed in my presence this 12th day of January, 1934.

(Signed) A. W. HANES,
Notary Public.

My commission expires Feb. 27th, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Equity No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Equity No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

AFFIDAVIT OF R. L. IRELAND, JR.

STATE OF OHIO,
Cuyahoga County, ss:

R. L. Ireland, Jr., being duly sworn according to law, deposes and says that he is President of Eastern Ohio Coal Operators Association, a voluntary association, one of the

intervening plaintiffs herein, whose members are producers of coal in the Ohio No. 8 District in Eastern Ohio.

That he is Vice-President of the Hanna Coal Company, a corporation, one of the intervening plaintiffs herein, which is engaged in the production of bituminous coal in said Ohio No. 8 District.

That he has been interested and connected with the coal mining business for thirteen years, and that he is familiar with the conditions under which bituminous coal is produced in the said eastern Ohio District and in other districts of Ohio, and transported to points of consumption within the state of Ohio.

That at the present time a substantial part of the total annual production of coal in the State of Ohio, not less than twenty percent or four million tons, is transported from the mines to the consumer by motor trucks; that part of said truck movement presently takes place from mines in the Middle District of Ohio to consumers at Canton, Massillon and Akron, the railroad rates between which points are to be increased by the order of the Interstate Commerce Commission in its Docket No. 25566 in issue herein.

That in the opinion of affiant if said order in No. 25566 is permitted to take effect, the consequent increases in the railroad rates on coal from said Middle District and from said No. 8 District to Canton, Massillon and Akron, and other destinations in northeastern Ohio, will greatly increase said movement of coal by motor truck from said Middle District to Canton, Massillon and Akron, and will bring about the opening of new truck mines in said Middle District and in said Ohio No. 8 District and the movement of large additional quantities of coal from said Districts to Canton, Massillon and Akron and other destinations in northeastern Ohio, including Cleveland, all of which will correspondingly diminish said movement by railroad.

That the movement of bituminous coal by motor truck within Ohio, including movements to destinations affected by the said order of the Interstate Commerce Commission, has substantially increased since the hearings before the Interstate Commerce Commission in said No. 25566 and is now increasing, and said movement will, in the opinion of the affiant, be greatly stimulated and increased if said order in No. 25566 is permitted to take effect.

That by reason of the facts stated the coal tonnage which would be lost by the rail mines and rail carriers in Ohio to truck mines and truck carriers if the order in said No. 25566 were permitted to take effect will not inure to the benefit of mines in other states than Ohio and the railroads serving such mines.

(Signed) R. E. IRELAND, JR.

Sworn to before me and subscribed in my presence this 12th day of January, 1934.

[SEAL.] (Signed) W. C. KLINE,
Notary Public.

A true copy of the Original. Filed Jan. 13, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Equity No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 13, 1934. H. F. Rabe, Clerk.

APPLICATION BY PLAINTIFFS AND INTERVENING PLAINTIFFS FOR STAY PENDING APPEAL.

To: The HONORABLE BENSON W. HOUGH and ROBERT R. NEVIN, Judges of said Court:

Now comes the Wheeling & Lake Erie Railway Company, plaintiff herein, and Eastern Ohio Coal Operator's Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal & Dock Company, Ohio and Pennsylvania Coal Company, United States

Coal Company, Warner Colliers Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire & Rubber Company, Firestone Tire & Rubber Company, B. F. Goodrich Company, Republic Steel Corporation and Otis Steel Company, intervening plaintiffs herein, and before the entry of a final decree herein, in accordance with the opinion of the court heretofore filed, represent to the Court:

(N. B.—Remainder of text, with accompanying affidavits omitted in printing because identical with similar application by State of Ohio and Public Utilities Commission of Ohio, next preceding).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Equity No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Equity No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

AFFIDAVIT OF P. C. SPRAGUE.

STATE OF OHIO,
County of Cuyahoga, ss:

P. C. Sprague being duly sworn according to law, deposes and says that he is Vice President of Hanna Coal Com-

pany, a corporation, one of the intervening plaintiffs herein, which is engaged in producing bituminous coal in the Ohio No. 8 District in eastern Ohio and selling said coal to dealers and consumers in northeastern Ohio in competition with bituminous coal produced in the mining districts of western Pennsylvania, West Virginia and eastern Kentucky;

That he is a member of the Traffic Committee of Eastern Ohio Coal Operators Association, a voluntary association, one of the intervening plaintiffs herein, composed of most of the producers of bituminous coal in the said Ohio No. 8 District;

That he is Chairman of the Marketing Committee of the Ohio Subdivision of Division No. 1 of the Coal Code Authority established pursuant to the Code of Fair Competition of the bituminous coal industry and approved by the President of the United States under the National Recovery Act; that he has been interested in and connected with the coal mining business for twelve years;

That he is familiar with the prices and the basis for prices of bituminous coal sold to dealers and consumers at destinations in northeastern Ohio affected by the order of the Interstate Commerce Commission of May 2, 1933 (as modified) in its Docket No. 25566 here in issue, with the sources of supply of such coal both within the State of Ohio and in other states including western Pennsylvania, West Virginia and eastern Kentucky, and with the competitive relations among the producers of such coal;

That all coal sold to dealers and consumers in northeastern Ohio as aforesaid, with the exception of a small amount sold under special contracts, is sold at f. o. b. mine prices; that if the rates prescribed by said order of the Interstate Commerce Commission in its Docket No. 25566 become effective the cost to dealers and consumers at said destinations of approximately 98% of the coal produced in Ohio

will be increased by the difference between the present rates and the rates prescribed by said order;

That affiant believes that if the prices of Ohio coal sold to consumers and dealers in said destinations as aforesaid are so increased a very large part of the coal now being produced in Ohio and transported by railroad to said destinations, amounting to many millions of tons per year, will be displaced either by coal produced at other mines in the State of Ohio not served by railroads and will be transported by motor truck from such mines to said destinations, or will be replaced by coal produced at mines in western Pennsylvania, West Virginia and eastern Kentucky and transported by rail or by river and rail to said destinations;

That in the event of such dislocation of business from Ohio mines and railroads as aforesaid to mines served by truck or to mines in other states, the business of mining, selling and transporting bituminous coal will be greatly disturbed and disorganized with resulting widespread unemployment among mine labor and the consequent migration of mine labor from the mines so deprived of such business to those to which it is transferred, all to the great and irreparable injury of the producers of coal in the State of Ohio and the persons employed in the production of the same and of the railroads transporting such coal;

That if the decree of this Court is reversed on appeal and said order of the Interstate Commerce Commission in No. 25566 is permanently enjoined, the prices of coal produced in Ohio and sold to dealers and consumers in northeastern Ohio as aforesaid will be reduced by the amount of the reductions in the Ohio rates which will thereby be brought about and will be restored to their present basis;

That affiant believes that in the event of such a restoration of the prices of such coal to the present basis the coal

lost to Ohio mines and railroads as aforesaid and diverted therefrom to other mines served by motor trucks or to mines in other states will thereupon be diverted back to the Ohio mines now producing such coal, and that the disruption of and interference with the business of producing, selling and transporting coal in Ohio and the consequent interference with mine labor and the resulting unemployment, migration and re-employment will recur in the same manner as heretofore alleged in connection with the shift of such business consequent upon the taking effect of the rates prescribed by the Interstate Commerce Commission in its said Docket No. 25566.

(S.) P. C. SPRAGUE.

Sworn to before me and subscribed in my presence this 18th day of January, 1934.

(SEAL) (S.) H. A. GALE,
Notary Public.

My Commission expires Jan. 31, 1936.

A true copy of the Original. Filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, PLAINTIFFS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

ANSWER OF INTERSTATE COMMERCE COMMISSION TO APPLICATION BY PLAINTIFFS AND INTERVENING PLAINTIFFS FOR STAY OF THE OPERATION OF THE COMMISSION'S ORDER PENDING APPEAL.

To the Honorable Charles C. Simons, Circuit Judge, the Honorable Benson W. Hough, District Judge, and The Honorable Robert R. Nevin, District Judge, Sitting as a Statutory Court:

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, for

answer to the application by plaintiffs and intervening plaintiffs for stay of the operation of the Commission's order of May 2, 1933, in No. 25566, *Intrastate Rates on Bituminous Coal Within State of Ohio*, 192 I. C. C. 413, pending determination of appeal to the Supreme Court of the United States from the final decree in this cause dismissing the petition for want of equity, answers and says:

I.

Answering the allegations of paragraph numbered (1) of the application, the Commission calls the Court's attention to the fact that even though plaintiffs carry out their intention as alleged in said paragraph, to perfect and prosecute their appeal "with all possible expedition." It would still be gravely doubtful whether the appeal could be perfected and docketed in the Supreme Court in time for it to be argued and decided at this term of the Supreme Court, since the Supreme Court ordinarily does not sit for hearing arguments after April or, at the latest, early in May. Failing decision this term, it would mean, if this Court should grant a stay, that the Commission's order could not become operative until at least nine months hence, and possibly a year or more, depending upon how promptly the appeal were argued and decided by the Supreme Court, with the result that plaintiffs and intervening plaintiffs would continue to secure the application of rates found by the Commission to be unlawful, in a decision and order upheld as entirely valid by this Court whose opinion which found the practice condemned in the Commission's decision and order to be "one of the worst evils which the Interstate Commerce Act and its amendments of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination."

II.

Answering the allegations of paragraph numbered (2) of the application, the Commission denies that irreparable loss and damage will ensue either to plaintiffs, or intervening plaintiffs, or any one else, as the result of the taking effect and operation of the Commission's order. This order, issued with and as part of the Commission's report of May 2, 1933, in a proceeding entitled Docket No. 25566, *Intrastate Rates on Bituminous Coal within State of Ohio*, 192 I. C. C. 413, is directed against the Baltimore & Ohio Railroad Company and numerous other common carriers by railroad, subject to the provisions of the Interstate Commerce Act, engaged in transporting bituminous coal from mines in Pennsylvania and West Virginia to destinations in northeastern Ohio, in interstate commerce, and from mines in eastern Ohio to the same destinations in northeastern Ohio, in intrastate commerce. The order requires said carriers, respondents in the proceeding before the Commission, "to cease and desist from practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia to destinations in Ohio, on the one hand, and the intrastate rates on like traffic" from points in Ohio to the same destinations in Ohio, as indicated in the said report, on the other. This undue prejudice and unjust discrimination against interstate shippers and interstate commerce was brought about as the result of reductions in the Ohio rates, the first of which occurred August 1, 1932, on which date reductions ranging from 4 to 29 cents per ton, prescribed by the Ohio Commission in the rates from the Ohio No. 8, Massillon

and Middle districts of Ohio to Massillon City and Canton, Ohio, became effectiye. Following these first reductions by the Ohio Commission, reductions were made from all the other Ohio districts to northeastern Ohio. Because of the first reductions, discriminations were brought about and each of the succeeding reductions was for the purpose of removing the discrimination, until finally the rates from all the Ohio coal fields to northeastern Ohio were reduced. But the process of rate reductions required or authorized by the Ohio Commission for the purpose of removing discrimination stopped at the State line. That was as far as the authority of the Ohio Commission extended. No corresponding reductions were made from the mining districts beyond the Ohio State line, and, in order to obtain relief from the discriminations brought about against them by reason of the reductions in Ohio, the interstate shippers necessarily appealed to the Interstate Commerce Commission, the only body having jurisdiction over the interstate rates. For a number of years, at least since the decision of the Interstate Commerce Commission in *Ohio-Michigan Coal Cases*, 80 I. C. C. 603, in June, 1923, the rate from Ohio No. 8 to Cleveland, as a typical destination, was 10 cents under the Pittsburgh district rate. The Pittsburgh district rate was 6 cents lower than the rate from the Connellsville district, and the latter rate in turn was 9 cents lower than from the Fairmont district. Thus the rate from Ohio No. 8 was 10 cents under Pittsburgh, 16 cents under Connellsville, and 25 cents under Fairmont. The reduction required by the Ohio Commission in the rate from Ohio No. 8 to Cleveland was 29 cents per ton. As the result the rate from Ohio No. 8 became 39 cents under Pittsburgh, 45 cents under Connellsville, and 54 cents under Fairmont. The Commission found that the prevailing interstate rates to northeastern Ohio from the Pittsburgh,

Connellsville, Freeport, and Fairmont districts were reasonable rates and that the disparity between these reasonable interstate rates, on the one hand, and the reduced Ohio intrastate rates, on the other hand, unduly preferred the Ohio intrastate shippers and unduly prejudiced the interstate shippers, and also caused unjust discrimination against interstate commerce. To remove the preference, prejudice and discrimination the Commission did not require the carriers to reduce their interstate rates below the reasonable level but required increases in the intrastate rates. Reductions in the interstate rates in question and related interstate rates down to the level of the intrastate rates would have resulted in revenue losses to the carriers of $44,108,248.61 annually if based on the 1929 tonnage, and $29,649,265.34 annually if based on the 1931 tonnage, and would have greatly reduced the carriers' return which even then was far below a fair return. The Commission's order was issued under the authority of section 13 (3) and (4) of the Interstate Commerce Act, and, as required by the mandate of those provisions, prescribes the specific manner in which the undue preference and prejudice and unjust discrimination found by the Commission shall be removed, namely, by restoring the intrastate rates in effect immediately prior to August 1, 1932. When the order becomes effective, plaintiffs and others shipping bituminous coal in intrastate commerce between the Ohio points in question will be compelled to pay the increased rates prescribed in the order for the purpose of removing the undue preference of and advantage to said intrastate shippers and the undue prejudice and disadvantage now suffered by the interstate shippers resulting from the present intrastate rates, but, should the order be held invalid by the Supreme Court upon appeal, plaintiffs and other Ohio shippers who have paid said increased Ohio intrastate

rates in the interim will have the right to restitution of the difference between said increased rates and the rates now in effect. Therefore said order, if permitted to go into effect at once, will not cause plaintiffs or any one else to suffer irreparable injury.

III.

Further answering the allegations of paragraph numbered (2) of the application, the Commission alleges that if the operation of its order is stayed pending determination of the appeal by the Supreme Court, the carriers who would otherwise have the benefit of said order will be subjected to irreparable injury in the event the validity of said order is upheld by the Supreme Court, for the reason that the carriers by virtue of outstanding orders of the regulatory body of Ohio will be compelled to maintain and apply intrastate rates now in effect and will have no practicable means of securing restitution of the difference between the present rates and the increased rates which they are ordered and required by the Commission's order to establish, maintain and apply. The Commission found that the Ohio intrastate traffic under the intrastate rates in issue "is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." (Report, p. 451.)

IV.

Further answering the allegations of paragraph numbered (2) of the application, the Commission alleges that if the operation of its order is stayed pending determination of the appeal by the Supreme Court, the interstate shippers who complained in the Commission and who have intervened in this cause in support of the Commission's

order, as well as all other interstate shippers of bituminous coal between the points in question, will suffer irreparable injury in that they will continue to be subjected to the undue prejudice found by the Commission to be caused by the present unlawful disparity as between the interstate and the Ohio intrastate rates in question resulting from the present unduly low intrastate rates in Ohio, the Commission having found that in Cleveland and at other destinations in northeastern Ohio, to which the rates in question apply, coal from mines in Pennsylvania and West Virginia is highly competitive with coal from Ohio mines; that there is a substantial movement of the coal from those mines to such destinations; that the movement of such coal from the Ohio mines to the Ohio destinations "is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other"; and that the intrastate rates in issue from the Ohio mines to the destinations in northeastern Ohio "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio." (Report, page 451.) Losses to the interstate shippers because of unlawful disparity as between the intrastate and interstate rates is fully indicated in the Commission's report, pages 420-421, as follows:

> "Numerous retail dealers at Cleveland and other northeastern Ohio destinations testified that since the

rates were reduced between Ohio points they have been unable to market coal from the Crescents because of the relatively higher price. They explain that they can shrink their profits to meet the differences in rates that existed prior to August 1, 1932, but since that time the Ohio operators' rates have been so much lower than those from the Crescents that it has been impossible to meet the Ohio competition. A witness for the Pittsburgh Coal Company testified in great detail regarding his lost business at Cleveland since the reductions in Ohio. He classified his customers A, B, C, and D. Class A customers consisted of dealers of whom 10 discontinued buying coal upon the Ohio reductions. Class B customers are those who elected to make no new contracts but continued to buy on spot market basis. All of these customers, numbering 15, were lost after the Ohio reductions, and the tonnage amounted to 646,900 tons annually. Class C customers are those who bought regularly from year to year but under no contract; 60 of these were lost and their tonnage amounted to 149,700 tons annually. Class D are customers who bought from time to time; 39 of these were lost and their tonnage amounted to 123,800 tons annually. Most of these customers are retail dealers and all of this coal was for steam and domestic use. This witness testified that conditions will not change with respect to the marketing of Pittsburgh coal in Ohio until the rate situation is altered.

Another witness, representing a coal producer in the Kanawha and Kenova-Thacker districts, also described his loss of business and difficulty in competing with Ohio mines since the reductions took effect. Similar testimony was given by many other coal operators who have previously shipped their coal to northeastern Ohio to a considerable extent. For example, a witness representing a coal producer on the Monongahela Railway in the Fairmont district estimated that his loss of tonnage to northeastern Ohio would be about 300,000 tons annually because of the reductions made in the Ohio rates. The record is replete with similar instances, in-

cluding testimony of a representative of the Public Service Commission of Pennsylvania that that State is losing its coal shipments to Ohio and southern fields, and that the restoration of the former relationships in rates with the Ohio fields to northeastern Ohio is vital to the mining districts of Pennsylvania. Witnesses testified that since the reduction in the Ohio rates the tonnage from Ohio mines to Cleveland has increased."

Similar losses will continue during the pendency of the appeal if the Commission's order is stayed, and these losses will be irreparable.

V.

Further answering said application, the Commission alleges that under pertinent decisions of the Supreme Court the granting of a stay under the facts and circumstances in this case is not justified. In *Virginian Ry. Co. v. United States*, 272 U. S. 658, 672-675, the Supreme Court held that a stay is not a matter of right, even if irreparable injury might otherwise result to the appellant; that it is an exercise of judicial discretion; and that the propriety of its issue is dependent upon the circumstances of the particular case. "An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits," the Court said, "calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the Court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved."

"But," said the Court, "to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitled defendant carriers and the public to the benefits which the order was intended to secure." After pointing out that in this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them and that the public would usually be left wholly remediless, the Court stated what must be made to appear to justify a stay. The Court said: "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

The Commission alleges that no such showing has been or can be made in this case.

(1) As to doubt of the correctness of the decision of the three-judge court in the case at bar. All three judges concurred in the opinion, without dissent in any particular. In the *Virginian* case, in which a stay was granted by the District Court, its decree was not unanimous. The Supreme Court said, however, that this fact alone would not justify a stay. The District Court made no finding or statement bearing upon its exercise of discretion in suspending the operation of the Commission's order, except a recital in the decree that from all the evidence in the case it was of opinion that irreparable damage would result to the com-

plainant (Virginian Railway Company) pending such appeal if the decree should be reversed on appeal. The Supreme Court held that this was not sufficient and that under the circumstances appearing the suspension of the Commission's order pending appeal was unwarranted. In *Warehouse Co.* v. *United States*, 283 U. S. 501, which from the reported opinions appears to be the only other case in recent years in which such a stay was granted, the decision of the District Court was not unanimous. There the Circuit Judge vigorously dissented from the decision of the two District Judges, 44 Fed. (2d) 379, 386, and the Supreme Court, holding the stay to have been justified, adverted to the fact that the judges of the specially-constituted District Court were not unanimous. 283 U. S. 514. Moreover, the Supreme Court found that the practice complained of was of long standing, entered into so far as appeared in good faith, at a time when the discrimination, if it existed, was much less serious than at the time it was complained of, and before the present prohibitions against discrimination, and the Court further said "the immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbances of a course of business affecting not alone the parties to this litigation, but the patrons of the various warehouses, which the Court below found would be irreparable." (*Ibid.*, 514.) In the case at bar the facts are virtually the converse. As found in the unanimous decision of the Court in this case "through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal-mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate mak-

ing"; that "this rate structure with which we are here concerned was last considered by the Interstate Commerce Commission (prior to the investigations here involved) in *Ohio-Michigan Coal Cases*, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton"; that "this threw the entire rate structure out of balance, operating to create a competitive advantage in behalf of the Ohio mines and operators, and by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage." The Commission's order, to cure the undue preference of intrastate shippers and unjust discrimination against interstate shippers and commerce, requires restoration of the intrastate rates in effect prior to the reductions by the Ohio regulatory body, thus restoring the finely balanced and nicely adjusted schedule of interstate and intrastate rates theretofore in effect.

The unanimous opinion of the three-judge court in this case seems to leave no room for doubt as to its correctness. The Court found that the putting in of the reduced Ohio rates, which created the preference, prejudice, and discrimination required by the Commission's order to be removed, created a competitive advantage in behalf of the Ohio shippers and discriminated against interstate shippers, who had theretofore been in active competition for the business at the several points of destination, by placing them at a competitive disadvantage; that viewed in the light which the Court must view the order of the Commission under the established law, the Court found that there is no question but that the order of the Commission must stand; that it can not be disputed, upon the record before the Court, that

there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding; that, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia, and that this was practically the only conclusion at which the Commission could have arrived; that the Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the intrastate rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates, as upon the whole reasonable, and that the practice condemned by the Commission is one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice or discrimination. The Court also carefully examined the various contentions of the plaintiffs in support of their allegation that the Commission's order was invalid and found them all to be without merit.

(2) There is no conflict in the decision of the courts upon the issues decided herein. This is demonstrated by the fact that each and every order of the Interstate Commerce Commission under section 13 (3) and (4) of the Interstate Commerce Act passed upon by the Supreme Court since the enactment of these provisions in Transportation Act, 1920, has been sustained by that Court, with the single exception of the *Florida* case, 282, U. S. 194, and the order therein was annulled solely on the ground that the Commission had failed to make proper subordinate findings in support of its ultimate finding of unjust discrimination against interstate commerce resulting from the burden upon the reve-

nues of the carrier caused by the unduly low State rates. The decision in the *Florida* case was relied upon by counsel for the plaintiffs in this case, was considered by the Court and cited in its opinion as authority for an order of the Commission requiring removal of undue preference and prejudice as between persons or localities in intrastate commerce on the one hand, and persons and localities in interstate commerce on the other hand, the Court's opinion in this case especially referring to page 210 of the *Florida* decision, in which the Court said:

> "The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. *Houston East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342; *Illinois Central Railroad Co.* v. *State Public Utilities Commission, supra* (245 U. S. 493); *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra* (257 U. S. 563); *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific Railroad Company*, 274 U. S. 597; *Alabama* v. *United States*, 279 U. S. 229."

The section 13 cases passed upon by the Supreme Court since Transportation Act, 1920, in which the Commission's order has been sustained, are *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *N. C. & St. L. Ry.* v. *Tenn.*, 262 U. S. 318; *United States* v. *Village of Hubbard*, 266 U. S. 474; *Alabama* v. *United States*, 279 U. S. 229 and 283 U. S. 776; *Georgia Comm.* v. *United States*, 283 U. S. 765; *Louisiana Comm.* v. *United States*, 283 U. S. 125; *United States* v. *Louisiana*, 290 U. S. —, 78 L. Ed. 50, decided November 6, 1933, not yet officially reported; *Montana* v. *United States*, 290 U. S. —, 78 L. Ed. —, decided November 13, 1933, not yet officially reported.

(3) No special reason appears why the order of the Commission ought not to become effective until its validity can be considered by the Supreme Court. On the contrary, strong reasons appear why the Commission's order should become effective promptly. This order is not essentially different from any of the orders in the above-cited cases, in none of which was a stay granted pending appeal to the Supreme Court. Fully supported by adequate findings of undue preference of intrastate shippers and localities to the undue prejudice of interstate shippers and localities, as found and determined by the statutory court, which findings are fully supported and justified by the evidence introduced before the Commission, as found and held by the statutory court, and being clearly within the power of the Commission to make under section 13 (3) and (4) of the Interstate Commerce Act, the Commission's order, *prima facie* valid when issued, has been found valid in every particular by the statutory court after examination of the record, full argument, both orally and in briefs, and after mature deliberation by the Court.

In *Cumberland Tel. Co.* v. *Pub. Ser. Comm.*, 260 U. S. 212, 219, the Supreme Court held that notwithstanding a denial of an injunction on its merits, the Court may properly find that pending a final determination of the suit on the merits in a court of last resort, a "balance of convenience" may be best secured by maintaining the *status quo* and securing an equitable adjustment of the finally adjudicated rights of all concerned through the conditions of a bond. The Supreme Court further said, however: "But the Court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and, therefore, is familiar with the record." The Commission suggests that in the exercise of

the nice discretion to determine the "balance of convenience" in this case, the Court should conclude to deny the stay, since if it be denied, the parties seeking it will not suffer irreparable loss but will have the right to restitution, whereas if it be granted, the other parties will suffer losses that will be wholly irreparable.

In the case at bar an equitable adjustment of the finally adjudicated rights of all concerned could not be secured by maintaining the present *status quo*, for at present the increased rates are not in effect but entry of a final decree dismissing the petitions herein, coupled with denial of a stay will permit the increased rates to become effective promptly and the equitable adjustment of finally adjudicated rights of all concerned could then be secured either through the conditions of a bond or a requirement that all carriers collecting the increased rates shall keep an accurate account in detail of all amounts received by them by reason of the increases in the rates as authorized and required by the Commission's order, specifying by whom or in whose behalf such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the Commission's order shall be set aside or annulled, the carriers shall refund such increases, with interest, to the persons by whom, or in whose behalf, such amounts were paid by reason of the increases in the rates as authorized and required by said order.

VI.

The Commission hereby prays that said application be denied and that final decree vacating and dissolving the temporary injunction and dismissing the bills for want of equity be entered.

INTERSTATE COMMERCE COMMISSION,
By J. STANLEY PAYNE,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission, of Counsel.

A True Copy of the Original. Filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1040.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

AFFIDAVIT:

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Roy S. Kern, being first duly sworn, says that he is Chairman of the Coal, Coke & Iron Ore Committee of Central Freight Association Territory, the Ohio Bureau of Coal Statistics, and Agent for the Ohio Coal Tariff Bureau, of which all of the railroads, except the Akron, Canton & Youngstown Railway, respondents in the proceeding before the Interstate Commerce Commission, known as *Docket 25566, et al, Intrastate Rates on Bituminous Coal within the State of Ohio*, are members; that he

has been Chairman of said Coal, Coke & Iron Ore Committee for more than five years and Chairman of and Agent for the said Statistical and Tariff Bureaus since July 1, 1933; that before becoming Chairman of said Committee and Bureaus he was employed by the New York Central Railroad in its Coal Traffic Department for a period of more than ten years; and that he is familiar with the bituminous coal rate structure obtaining in Ohio, Pennsylvania and West Virginia;

That as Chairman of the said Coal, Coke & Iron Ore Committee, the Ohio Bureau of Coal Statistics, and Agent for the Ohio Coal Tariff Bureau he is informed with respect to the transportation of coal, coke and iron ore within Central Freight Association Territory, and particularly within the State of Ohio, and that he has examined the reports of the Ohio Bureau of Coal Statistics, by him operated since July 1, 1933, and prior thereto by retired Chairman F. V. Davis of Columbus, Ohio, on behalf of all of the bituminous coal originating carriers in Central Freight Association Territory, and found that in the period January 1 to November 30, 1933, inclusive, there were shipped from origins and origin districts on the lines of carriers, respondents in said Docket 25566, except the Wheeling & Lake Erie Railway, to Akron, Alliance, Canton, Cleveland, Lorain, South Lorain, Mansfield and Massillon, Ohio, and their immediate environs, upon rates affected by said order of the Interstate Commerce Commission, dated May 2, 1933, in the said Docket 25566 and related cases—*Intrastate Rates on Bituminous Coal within the State of Ohio*, a total of 2,464,588 net tons, and that the difference in the total freight charges actually collected and those which would have resulted had rates found proper by the Interstate Commerce Commission in said decision and order in Docket 25566 and related cases applied was $658,738.71, which extended for the full year of 1933 would represent a total

revenue loss to the said carriers of not less than $718,624.65; that failure of the carriers to have assessed and collected rates on this traffic in accordance with said order of the Interstate Commerce Commission from June 10 to December 31, 1933, was due solely to the pendency of the proceedings instituted by the State of Ohio and Wheeling & Lake Erie Railway in the District Court of the United States for the Southern District of Ohio, Eastern Division, and the temporary or interlocutory injunctions by said Court entered, and that the revenue losses upon traffic moving during said period totalled at least $419,197.38. Affiant declares that these calculations of revenue losses are the lowest determinable because they are predicated upon tonnages moving to the cities herein named and their immediate environs, whereas the low intrastate rates required to be increased by the said order of the Interstate Commerce Commission extended to numerous cities, towns and municipalities situated intermediate to such points on the lines of respondent railroads, and that during the entire period bituminous coal has been transported to such intermediate destinations upon the said low intrastate rates, the total amount of which, although a substantial tonnage, is not definitely ascertainable from the reports of the said Ohio Bureau of Coal Statistics; nor do they take into account revenue losses on traffic originating on the line of the Wheeling & Lake Erie Railway Company and moving to the said destinations and points intermediate thereto upon through joint rates in connection with other carriers, respondents in said Docket 25566. The said calculations are furthermore conservative because they do not take into account an indeterminable loss of revenue due to the displacement of Ohio coals of coals normally moving to such points from origins in adjoining states on rates in all instances substantially higher than those obtaining on Ohio coals, said displacement being the result of the low

Ohio intrastate rates found to be preferential and unlawful by the Interstate Commerce Commission. These calculations moreover are made without reference to revenue losses incident to the failure of the said carriers to collect surcharges of 6-cents per net ton authorized by the Interstate Commerce Commission in Ex Parte 103 but suspended and enjoined by acts of the Public Utilities Commission of Ohio and the United States District Court for the Southern District of Ohio, Eastern Division.

With respect to said surcharges, affiant declares that carriers within the State of Ohio by reason of said acts of the Public Utilities Commission of Ohio and the United States District Court for the Southern District of Ohio, Eastern Division, suspending tariffs and enjoining enforcement thereof under order of the Interstate Commerce Commission, were prevented from collecting the said emergency charge of 6-cents per net ton on all bituminous coal traffic moving intrastate in Ohio during the six-month period April 1 to September 30, 1933, inclusive, during which period there was transported in intrastate commerce within the State of Ohio a total of 3,316,179 net tons, and that revenues of which the carriers were so deprived would have amounted to $198,970.74, of which $132,647.16 are directly attributable to the said temporary or interlocutory injunction entered by the United States District Court for the Southern District of Ohio, Eastern Division. This amount, added to the minimum revenue losses indicated in the next preceding paragraph, produces a total revenue loss for the year 1933, calculated on the lowest and most conservative basis, of $917,594.79, of which $551,844.54 are directly attributable to the pendency of said proceedings in the United States District Court for the Southern District of Ohio, Eastern Division.

Affiant further declares that to the best of his knowledge and belief the revenue losses as herein set forth, as

7/1

well as additional and substantial losses of an indeterminable character, are irretrievable and unrecoverable by legal or other process.

ROY S. KERN.

Sworn to before me and subscribed in my presence this 12 day of January, 1934.

[SEAL.] ELMER H. FUEHR,
Notary Public.

My commission expires June 27, 1936.

A True Copy of the Original. Filed Jan. 19, 1934.

Attest:

HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1040.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

AFFIDAVIT.

STATE OF OHIO,
County of Franklin, ss:

Roy S. Kern, being first duly sworn, says that he is the same person who by affidavit sworn to in Allegheny County, Pennsylvania, on January 12, 1934, and filed in this proceeding, said that revenue losses to carriers, respondents in the proceeding before the Interstate Commerce Commission, known as Docket 25566, et al., *Intrastate Rates on Bituminous Coal within the State of Ohio*, except the Wheeling and Lake Erie Railway Company, resulting from the

Ohio Intrastate Bituminous Coal rates in issue amounted to $718,624.05 which represents average monthly revenue losses of $59,885.34.

Affiant now declares that said revenue losses of $59,885.34 per month will in the future continue to be suffered by said respondents until the rates required by the Interstate Commerce Commission's order are made effective; that to the best of his knowledge and belief future revenue losses will exceed this amount because he anticipates that business conditions will improve and that the consumption of bituminous coal will correspondingly increase.

That because thereof affiant states the above forecast of future revenue losses is substantially less than will be suffered if the intrastate rates are further continued and must be treated as minimum rather than actual or maximum losses.

ROY S. KERN.

Sworn to before me and subscribed in my presence this 19th day of January, 1934.

[SEAL.]

WEALTHY S. BECK,
Notary Public.

In and for Franklin County, Ohio.
My term expires May 1, 1936.

A true copy of the original. Filed Jan. 19, 1934.

Attest:

HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity No. 1040.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 10, 1934. H. F. Rabe, Clerk.

AFFIDAVIT OF J. NOBLE SNIDER, GENERAL MANAGER OF SALES, RECEIVERS OF THE CONSOLIDATION COAL COMPANY.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, Elon A. Williams, a notary public, in and for the County of New York, State

of New York, J. Noble Snider, who, being duly sworn, deposes and says:

That he is General Manager of Sales for the Receivers of The Consolidation Coal Company, and as such has charge of the sales of coal for the Receivers. That he has been General Manager of Sales for the Receivers since June 2, 1932, and prior to that time Vice-President in Charge of Sales for The Consolidation Coal Company since January 1, 1930.

The Consolidation Coal Company is in the hands of Receivers and for convenience the Company and its Receivers are hereinafter referred to collectively as The Consolidation.

The Consolidation is a large and important producer of coal in the Fairmont District, located in northern West Virginia.

Prior to August 1, 1932, The Consolidation shipped approximately ten per cent of its commercial shipments from the Fairmont District into northeastern Ohio territory where it encountered, and still encounters, very severe competition from producers of coal in Ohio, principally in the Ohio No. 8 District.

Prior to August 1, 1932, the rates per ton to Cleveland, Ohio, the principal destination in northeastern Ohio, from the Fairmont District were 25¢ per ton higher than from the Ohio No. 8 District. From August 1, 1932, to date, they have been 54¢ per ton higher except that from April 1, 1933 to September 30, 1933, due to the refusal of the Public Utilities Commission of Ohio to permit the continued application of the 6¢ per ton emergency charge on Ohio intrastate coal traffic, the rates from Fairmont were 60¢ per ton higher than from the Ohio No. 8 District.

The increased spread in the rate to Cleveland, Ohio, for example, of 29¢ in the already existing spread of 25¢ in

the rate on bituminous coal applicable from the Ohio No. 8 and the Fairmont Districts, respectively, both producing substantially the same type of coal, added such a heavy competitive burden as to make it practically impossible for The Consolidation in the marketing of its coal produced in the Fairmont District, to overcome the freight rate advantage enjoyed by the Ohio districts. The disadvantage of Fairmont was more than doubled with the effectiveness of the increased spread in the rates as of August 1, 1932.

Affiant testified before the Interstate Commerce Commission in December, 1932, that according to the best information then available The Consolidation was losing, to competing producers in Ohio, approximately 12,000 to 15,000 tons per month of its general purpose, steam and domestic coal business in northeastern Ohio. In February, 1933, affiant again testified before the said Commission, showing additional losses in that business.

On June 2, 1933, based upon further information affiant executed an affidavit which affiant is advised was presented to this Court on June 3, 1933, that during the period August 1, 1932, to May 31, 1933, The Consolidated had lost to competing producers in Ohio approximately 19,000 to 20,000 tons per month of its general purpose, steam and domestic coal business in northeastern Ohio, and would continue to lose approximately the same amount so long as the reduced rates remained in effect in Ohio.

Since May 31, 1933, The Consolidation has continued to lose to competing Ohio producers general purpose, steam and domestic coal business in an amount not less than 20,000 tons per month.

From August 1, 1932, to December 31, 1933, The Consolidation has lost to competing Ohio producers more than 300,000 tons of its general purpose, steam and domestic coal business in northeastern Ohio.

Affiant believes that so long as the reduced rates in Ohio and the spread in the rates of 54 cents between Ohio No. 8 and Fairmont Districts remain in effect, The Consolidation will continue to lose to competing producers in Ohio approximately the same amount per month of its general purpose, steam and domestic coal business in northeastern Ohio, as it has been losing since August 1, 1932.

J. NOBLE SNIDER.

Subscribed to in my presence and sworn to before me in the County of New York, State of New York, by the affiant above named, this 12th day of January, 1934.

[SEAL.] ELON A. WILLIAMS,
Notary Public.

Notary Public Kings Co., No. 37. Reg. No. 4035. Cert. filed in N. Y. Co. No. 66, Reg. No. 4 W. 43. My commission expires Mch. 30, 1934.

A true Copy of the original. Filed Jan. 19, 1934.

Attest:

HARRY F. RABE,
Clerk.

By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

AFFIDAVIT OF ELMER STRIEBEL, MANAGER, SALES OFFICE, PITTSBURGH COAL COMPANY, CLEVELAND, OHIO.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Personally appeared before me, G. A. Hopper, a notary public, in and for the County of Allegheny, State of Penn-

sylvania, Elmer Striebel, who being duly sworn, deposes and says:

That he is the same Elmer Striebel who testified as a witness before the Interstate Commerce Commission at Columbus, Ohio, December 19, 1932, in the proceeding before said Commission, styled Docket No. 25566 and related cases, Rates on Bituminous Coal Within the State of Ohio, which said testimony is recorded in the transcript of the minutes of the hearing before said Commission at pages 719-740.

That he has ever since December 19, 1932 been, and is now, Manager of the Sales Office of the Pittsburgh Coal Company in Cleveland, Ohio, and as such is informed concerning and fully conversant with the sales policy of, and sales of bituminous coal by said Pittsburgh Coal Company in Northern Ohio, except in and around Youngstown, Ohio, and has been so informed since long prior to August 1, 1932.

That of contract customers of the Pittsburgh Coal Company in Northeastern Ohio, who on or about August 1, 1932 abrogated their contracts with and discontinued taking coal from the Pittsburgh Coal Company, and began instead to take coal from Ohio producing districts, from which the freight rates had been reduced on or about August 1, 1932, and whose business aggregates approximately 14,300 tons per annum, none has resumed taking coal from said Pittsburgh Coal Company, and all have continued to take coal from Ohio producing districts throughout the period down to and including December 31, 1933.

That of former contract customers of the Pittsburgh Coal Company in Northeastern Ohio, who in prior years had customarily purchased coal from said Pittsburgh Coal Company on contracts for their entire year's requirements and who, on or about April 1, 1932, elected to make no new

contracts with said Pittsburgh Coal Company but continued to buy coal from said Pittsburgh Coal Company on a spot market basis, and thereafter discontinued such buying from said Pittsburgh Coal Company on or about August 1, 1932, none has resumed buying coal from said Pittsburgh Coal Company, and all have continued to buy coal from Ohio producing districts from which the freight rates had been reduced on or about August 1, 1932, throughout the period down to and including December 31, 1933; and that the business so lost and continued to be lost by said Pittsburgh Coal Company, down to and including December 31, 1933, aggregates approximately 646,900 tons per annum.

That of regular spot customers of the Pittsburgh Coal Company in Northeastern Ohio, who were actually buying coal from said company up to August 1, 1932, and who then discontinued buying coal from said Pittsburgh Coal Company and commenced buying coal from competing producing districts in Ohio, customers whose business aggregates approximately 2,000 tons per annum have resumed buying coal from said Pittsburgh Coal Company, and all other such customers have not resumed buying coal from said Pittsburgh Coal Company, up to and including December 31, 1933, but have continued to take coal from competing producing districts, from which the rates on bituminous coal to Northeastern Ohio were reduced on or about August 1, 1932, and that the business so lost and continued to be lost aggregates 147,700 tons annually.

That of potential customers of the Pittsburgh Coal Company in Northeastern Ohio, with business aggregating 123,800 tons annually, considered as prospects for coal sold by the Pittsburgh Coal Company, on or about August 1, 1932, and since, none have commenced to purchase coal from

said Pittsburgh Coal Company at any time up to and including December 31, 1933.

That in particular markets of Northeastern Ohio to which rates on bituminous coal from producing districts in Ohio were not reduced on or about August 1, 1932, the normal expectancy of business has been retained by the Pittsburgh Coal Company.

That the sales of bituminous coal by the Pittsburgh Coal Company in Northeastern Ohio markets, since on or about August 1, 1932, and down to and including December 31, 1933, have declined to a much greater extent than have the sales by said Pittsburgh Coal Company in any other market territory.

(Sd.) ELMER STRIEBEL.

Subscribed and sworn to before me, at Pittsburgh in the County of Allegheny, and state of Pennsylvania by the affiant above named, this 12th day of January, 1934.

(Sd.) G. A. HOPPER,
Notary Public.

My commission expires Apr. 1, 1935.

A true copy of the original. Filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk,
By C. P. WHITE, JR.,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO, PETITIONERS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDENTS,

AND

BALTIMORE & OHIO RAILROAD COMPANY, ET. AL., INTERVENING DEFENDANTS.

Filed Jan. 19, 1934. H. F. Rabe, Clerk.

ORDER DENYING APPLICATION AS MADE, FOR STAY OF ORDER OF THE INTERSTATE COMMERCE COMMISSION, DATED MAY 2ND, 1933, PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES, BUT GRANTING STAY FOR A PERIOD NOT TO EXCEED SIXTY DAYS, AND REQUIRING DEFENDANT CARRIERS TO PRESERVE AND ACCOUNT FOR ALL AMOUNTS RECEIVED BY THEM BY VIRTUE OF SAID ORDER OF THE INTERSTATE COMMERCE COMMISSION.

This cause coming on to be heard on application of petitioners for the entry of an order staying the operation and enforcement of the order of the Interstate Commerce Commission dated May 2nd, 1933, as set forth in the petition in

the above-entitled cause, pending the determination of an appeal to the Supreme Court of the United States from the final order and decree of this Court dismissing said petition for want of equity, and the court having heard the evidence and the argument of counsel, and being fully advised in the premises, finds that said application should be denied; but that the operation and enforcement of the order of the Interstate Commerce Commission, dated May 2nd, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof for the purpose of perfecting an appeal to the Supreme Court of the United States.

The Court further finds, that at the expiration of sixty days from the date hereof, the intervening defendant carriers and The Wheeling and Lake Erie Railway Company, The Lorain & West Virginia Railway Company, and The Akron, Canton & Youngstown Railway Company, and each of them, should keep an accurate account in detail of all amounts received by them by reason of the increase in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2nd, 1933, specifying by whom or in whose behalf such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or annulled, the aforesaid carriers, and each of them, shall refund such increases to the persons by whom, or in whose behalf, such amounts were paid by reason of the increases in the rates as authorized and required by said order of the Interstate Commerce Commission of May 2nd, 1933. It is therefore

Ordered, adjudged, and decreed, this 19th day of January, 1934, that said application of petitioners, as made, for stay of said order of the Interstate Commerce Commission, dated May 2nd, 1933, pending appeal to the Supreme Court of the United States, be and the same is hereby denied; but that the operation and enforcement of the order of the inter-

state Commerce Commission, dated May 2nd, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States.

It is further ordered, adjudged, and decreed, that at the expiration of sixty days from the date hereof, the intervening defendant carriers, and The Wheeling and Lake Erie Railway Company, The Lorain & West Virginia Railway Company, and The Akron, Canton & Youngstown Railway Company, and each of them, shall keep accurate account in detail, of all amounts received by them by reason of the increases in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2nd, 1933, specifying by whom, or in whose behalf, such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or annulled, the aforesaid carriers, and each of them, shall refund such increases to the persons by whom, or in whose behalf, such amounts were paid by reason of the increases in the rates as authorized and required by said order of the Interstate Commerce Commission of May 2, 1933.

(Signed) CHARLES C. SIMONS,
United States Circuit Judge.
(Signed) BENSON W. HOUGH,
United States District Judge.
(Signed) ROBERT R. NEVIN,
United States District Judge.

A true copy of the original filed Jan. 19, 1934.

Attest:
HARRY F. RABE,
Clerk.
By C. P. WHITE, JR.,
Deputy.

SUPREME COURT OF THE UNITED STATES

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

To the Honorable

The Associate Justice of the Supreme Court of the United States assigned to the Sixth Circuit:

APPLICATION FOR ALLOWANCE OF AN APPEAL TO REVIEW IN PART THE FINAL DECREES AND SUPPLEMENTAL ORDERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, ENTERED IN THE ABOVE ENTITLED CAUSES OF THE 19TH DAY OF JANUARY, 1934.

Now come—

The United States of America;
The Interstate Commerce Commission;
The Public Service Commission of the Commonwealth of

Pennsylvania;
The Baltimore & Ohio Railroad Company;
The Chesapeake & Ohio Railroad Company;
Erie Railroad Company;
The Monongahela Railroad Company;
The New York Central Railroad Company;
The New York, Chicago & St. Louis Railroad Company;
Norfolk & Western Railway Company;
The Pennsylvania Railroad Company;
Pittsburgh, Chartiers & Youghiogheny Railroad Company;
The Pittsburgh & West Virginia Railway Company;
The Pittsburgh & Lake Erie Railroad Company;
Western Maryland Railway Company;
The Virginian Railway Company;
Western Pennsylvania Coal Traffic Bureau, Carnegie Coal Company, *et al.;*
Robert C. Hill and Howell Fisher, Domiciliary Receivers of The Consolidattion Coal Company;
Robert C. Hill and William H. Koch, Ancillary Receivers of The Consolidation Coal Company within the Northern District of West Virginia; and
The Consolidation Coal Company, by its Domiciliary and Ancillary Receivers;

and pray allowance of an appeal or appeals direct to the Supreme Court of the United States to review so much of the final decree and supplementary order of the District Court of the United States for the Southern District of Ohio, Eastern Division (a three-judge court), severally passed and entered in each of the above entitled causes on the 19th day of January, 1934, in the certain proceedings pendings before said Court and entitled as above, as stayed and suspended for a period of sixty days from its own

date the certain order of the Interstate Commerce Commission dated May 2d, 1933, entered in said Commission's Docket No. 25566, Intrastate Rates on Bituminous Coal, Within State of Ohio, and in support of such application, these applicants respectfully show:

That effective on or about August 1st, 1932, the Public Utilities Commission of the State of Ohio required these applicants and other carriers operating in the State of Ohio to reduce by substantial amounts their published tariff rates on movements of bituminous coal from producing districts in the State of Ohio to Cleveland, Akron, Lorain, Canton, Massillon, Mansfield and numerous other destination points in the northeastern portion of that State; that thereafter, upon petitions filed by these applicants Interstate Commerce Commission instituted an investigation of the lawfulness of the rates as so reduced by the Public Utilities Commission of Ohio and after extensive hearings wherein the Public Utilities Commission of the State of Ohio and numerous shippers and receivers of coal intrastate in Ohio and interstate from mines in Pennsylvania, West Virginia and other States were heard, the Interstate Commerce Commission handed down its report and order, dated May 2, 1933, I. C. C. Docket No. 25566, *Intrastate Rates on Bituminous Coal* within the State of Ohio, in which it held that the reductions in rates required to be made by the Public Utilities Commission of the State of Ohio and resulted in undue prejudice against persons and localities and in unjust discrimination against interstate commerce, and required the removal of the undue prejudice and discrimination so found.

That thereafter, the State of Ohio and others filed in the United States District Court for the Southern District of Ohio, Eastern Division, petitions to enjoin said order of the Interstate Commerce Commission requiring restoration

of the Ohio intrastate rates to their former levels, that is, to the basis which was in effect prior to August 1st, 1932, when the Ohio state authorities required reductions as aforesaid. Said petitions were filed in said District Court on or about May 22, 1933, and docketed as number 1030 and number 1040 on the Equity Docket of said District Court.

Said causes came on for trial on June 3d, 1933, before their Honors, Smith Hickenlooper, Circuit Judge, and Robert R. Nevin and Benson W. Hough, District Judges, and on January 6th, 1934, the District Court, as so constituted, rendered its opinion dismissing the petitions of the State of Ohio and others for want of equity; that on January 19, 1934, the District Court entered final decrees in the same proceedings, vacating and setting aside the temporary injunctions it had issued on July 7, 1933, in said cases, and dismissing the petitions for want of equity at the cost of petitioners, but on the same day, to-wit, January 19, 1934, the District Court, on application of the State of Ohio and others, entered a further order, in which it granted a further stay of sixty days of the order of the Interstate Commerce Commission dated May 2, 1933, over objections and protests of these defendants-applicants, and notwithstanding the failure of the State of Ohio and others opposing the order of the Interstate Commerce Commission to make proper or adequate showing that they were entitled to the relief prayed for, and the abundant proof of irreparable damage and injury presented to the District Court by these applicants and other parties supporting the order aforesaid.

Wherefore, your petitioners being aggrieved respectfully pray allowance of an appeal from so much of said final decree and supplementary order of said District Court as stayed and suspended for sixty days the order of the Inter-

state Commerce Commission, and for such other and further relief as to Your Honors may seem meet and proper.

ELMER B. COLLINS,
For United States of America.
J. STANLEY PAYNE,
For Interstate Commerce Commission.
GUERNSEY ORCUTT,
F. D. McKENNEY,
For Other Applicants Above Named.

Appeals allowed: Bond fixed in sum of $500 in each case.

J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

February 3d, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ASSIGNMENT OF ERRORS.

The District Court of the United States for the Southern District of Ohio having found and declared that the order of the Interstate Commerce Commission passed on or about the 2d day of May, A. D. 1933, requiring all Ohio intrastate rates on movements of bituminous coal to named destinations in said state of Ohio to be increased so as to avoid ascertained preference in favor of Ohio shippers and localities and undue prejudice against interstate localities and shippers of bituminous coal and discrimination against interstate commerce was justified by substantial evidence and that plaintiff's bill of complaint filed herein was without equity and of right should be dismissed;

1. It was error to suspend the effectivity of its final decree dismissing the bill of complaint for want of equity by at the same time entering its supplemental order suspending and staying for sixty days the effective date of said order of May 2d, 1933, of said Interstate Commerce Commission, there being no doubt in its own mind as to the correctness of the decision at which it had arrived and which it had unanimously announced; and no conflict whatever among the courts of the several circuits as to the proper disposition to be made of the questions of law involved nor any showing or even serious attempts to show the existence of any special or even worthy reason why the order of the Interstate Commerce Commission which had been sought to be set aside and which for more than seven months had already been temporarily, and as the event demonstrates, wrongfully, stayed, should continue to be held inoperative until its validity should be further considered by the Supreme Court of the United States.

2. It was error in the circumstances to further suspend the effectivity of said order of the Interstate Commerce Commission, when the inevitable result of such suspension was to work irreparable damages to each and every of these Intervenor-Appellants.

ELMER B. COLLINS,
For United States of America.
J. STANLEY PAYNE,
For Interstate Commerce Commission.
GUERNSEY ORCUTT,
F. D. MCKENNEY,
For Appellants.

February 3, 1934.

Bond as required, given with The Fidelity & Casualty Company of New York—as surety—and approved.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity. No. 1039.

STATE OF OHIO AND PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In Equity. No. 1040.

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, A CORPORATION,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 12, paragraph 1 of the Rules of Practice applicants for allowance of appeals to this honorable Court from the final decree and accompanying stay orders of the District Court of the United States for the Southern District of Ohio, Eastern Division, entered in each of the

above entitled causes on the nineteenth (19th) day of January, 1934, state as follows:

1. Above causes and each of them was instituted in the United States District Court for the Southern District of Ohio, Eastern Division, under authority of an Act of Congress approved October 22, 1913, ch. 32, 38 Stat. 220, U. S. Code 28, Sec. 47 to enjoin and set aside a certain order of the Interstate Commerce Commission bearing date the 2d day of May, 1933, in a case then pending before it known as I. C. C. Docket 25666, *Intrastate Rates on Bituminous Coal within the State of Ohio.* In each case interlocutory injunction was prayed and the cases came on for hearing before a specially constituted District Court consisting of a Circuit and two District Judges of the United States. After argument, the parties in open court stipulating so to do, the cases were submitted as on final argument for final decree. Thereafter, the effective date of the Commission's order complained of being imminent (viz. July 10, 1933), said District Court on the 7th day of July, 1933, restrained and suspended said Commission's order of May 2, 1933, until the further order of said District Court, which said further order, entered January 19, 1934, found and determined that said temporary injunction should be "vacated and set aside" and that the Petition to Enjoin said order of the Interstate Commerce Commission of May 2, 1933, in each of the above causes "should be dismissed for want of Equity, at costs of petitioners," but added thereto "that the operation and enforcement of the order (of May 2, 1933) of the Interstate Commerce Commission "be stayed for a period not to exceed sixty days from the date hereof (viz. January 19, 1933) for the purpose of perfecting an appeal to the Supreme Court of the United States"; from and after expiration of said sixty days all intervening carriers to keep accurate accounts in detail, pending

final determination of the causes in this honorable Court, and in event said order of May 2, 1933, be set aside or annulled then to refund all increases thereunder collected.

This appeal is from and intended to effect review of only so much of said final decree and attendant order as purports to further stay the effective date of the order of the Interstate Commerce Commission of May 2d, 1933 "for a period not to exceed sixty days from January 19, 1934, for the purpose of perfecting an appeal to the Supreme Court of the United States."

1. The Act of October 22, 1913, ch. 32, 38 Stat. 219; U. S. Code Title 28, Sec. 46, 47, in conjunction with Act of February 13, 1925, 43 Stat. 936; U. S. Code Title 28, Sec. 44, 45a, 46, 47, 47a and 48 provide for and authorize direct review by and on appeal to the Supreme Court of the United States from both interlocutory and final decrees of United States District Courts in cases such as here at bar.

2. The final decree of the United States District Court for the Southern District of Ohio, Eastern Division, bear date of January 19, 1934.

3. Appellants cite Virginian Railway Company v. United States, et al., 272 U. S. 658, 672 et seq., in support of their claim of jurisdiction, and on the merits.

ELMER B. COLLINS,
For United States of America.
J. STANLEY PAYNE,
For Interstate Commerce Commission.
GUERNSEY ORCUTT,
F. D. McKENNEY,
Attorneys for Appellants.